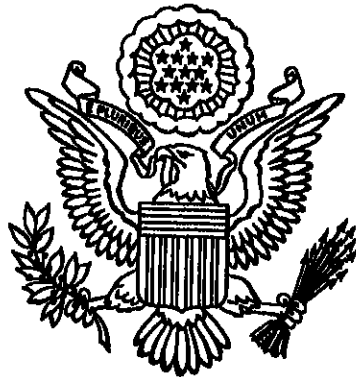


**FEDERAL MINE SAFETY
AND
HEALTH REVIEW COMMISSION**



**AUGUST 1985
Volume 7
No. 8**

DECISIONS

AUGUST

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Secretary of Labor, MSHA v. Ozark-Mahoning Company, Docket No. LAKE 84-96-M.
(Judge Melick, July 9, 1985)

Review was denied in the following case during the month of August:

Secretary of Labor, MSHA v. Shannopin Mining Company, Docket No. PENN 85-33.
(Judge Melick, July 13, 1985)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 5, 1985

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. SE 82-48
	:	
BLACK DIAMOND COAL MINING	:	
COMPANY	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) (the "Mine Act") and raises two issues: (1) Whether Black Diamond Coal Mining Company ("Black Diamond") violated 30 C.F.R. § 75.400, a mandatory safety standard prohibiting accumulations of combustible materials 1/, and (2) whether Black Diamond improperly was denied an opportunity in this proceeding to challenge the inspector's finding that the above violation and an admitted violation of 30 C.F.R. § 75.200 were caused by its unwarrantable failure to comply with the standards. A Commission administrative law judge concluded that Black Diamond violated the standards and refused to permit it to challenge the inspector's unwarrantable failure findings. 5 FMSHRC 764 (April 1983)(ALJ). For the reasons set forth below, we affirm.

1/ 30 C.F.R. § 75.400, which is identical to section 304(a) of the Mine Act, 30 U.S.C. § 864(a), provides:

Coal dust, including float coal dust deposited on rock dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 5, 1985

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
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v.	:	Docket No. SE 82-48
	:	
BLACK DIAMOND COAL MINING	:	
COMPANY	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) (the "Mine Act") and raises two issues: (1) Whether Black Diamond Coal Mining Company ("Black Diamond") violated 30 C.F.R. § 75.400, a mandatory safety standard prohibiting accumulations of combustible materials 1/, and (2) whether Black Diamond improperly was denied an opportunity in this proceeding to challenge the inspector's finding that the above violation and an admitted violation of 30 C.F.R. § 75.200 were caused by its unwarrantable failure to comply with the standards. A Commission administrative law judge concluded that Black Diamond violated the standards and refused to permit it to challenge the inspector's unwarrantable failure findings. 5 FMSHRC 764 (April 1983)(ALJ). For the reasons set forth below, we affirm.

1/ 30 C.F.R. § 75.400, which is identical to section 304(a) of the Mine Act, 30 U.S.C. § 864(a), provides:

Coal dust, including float coal dust deposited on rock dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

On November 12 and 16, 1981, during a regular inspection of Black Diamond's Shannon Mine, Milton Zimmerman, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), issued two orders of withdrawal pursuant to section 104(d)(1) of the Mine Act. 2/ The order issued on November 12 alleged a violation of section 75.400 due to an accumulation of loose coal, coal dust and float coal dust. The order issued on November 16 alleged a violation of 30 C.F.R. § 75.200 in that Black Diamond failed to comply with its approved roof control plan. 3/ In his order the inspector found, pursuant to section 104(d)(1), that the violations could "significantly and substantially

2/ Section 104(d)(1), 30 U.S.C. § 814(d)(1), states:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

3/ 30 C.F.R. § 75.200, which restates section 302(a) of the Mine Act, 30 U.S.C. § 862(a), states in part:

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form.... The plan shall show the type of support and spacing approved by the Secretary. ...

contribute to the cause and effect of a coal ... mine safety or health hazard" and that each of the violations was caused by "an unwarrantable failure of [Black Diamond] to comply with [the cited] mandatory ... safety standards."

Black Diamond did not contest the validity of the withdrawal orders within 30 days of their receipt. 4/ Subsequently, MSHA notified Black Diamond of the penalties that it proposed for the violations: \$750 for the violation of 30 C.F.R. § 75.400 and \$500 for the violation of 30 C.F.R. § 75.200. Black Diamond filed a notice of contest and the Secretary petitioned the Commission to assess the proposed penalties. On August 2, 1982, Black Diamond answered the Secretary's petition stating, "The proposed assessment is an error as a matter of fact ... the proposed fine [does] not follow the statutory guideline for assessment." The Secretary filed additional documents to supplement the penalty petition and new penalties of \$1,000 for each violation were proposed. Black Diamond amended its answer to "request[] that a hearing be held on the ... proposal for assessment of civil penalty."

At the hearing Black Diamond did not dispute that it violated 30 C.F.R. § 75.200, but argued that the proposed penalty was too high. However, it did contest the violation of 30 C.F.R. § 75.400. Inspector Zimmerman testified regarding the violation of section 75.400 that he observed loose coal, which appeared to him to have accumulated over four to five production shifts, extending the entire length of the 400 foot beltline. According to the Inspector, the loose coal was from one foot to four feet nine inches deep, and four to ten feet wide. In addition, the inspector observed accumulations of float coal dust along the beltline that were 1/16th of an inch deep. The inspector also stated that at the point where the accumulated material was deepest, the bottom belt rollers were running in the accumulations. The inspector believed the material to be combustible despite the fact that the coal accumulations were damp.

Black Diamond's underground foreman, Paul Province, at first testified that the cited materials under the belt were either rock, fire clay, or coal mixed with rock and fire clay. 5/ Mr. Province also testified that 80% of the accumulated material was rock and that the remaining 20% was coal.

4/ Section 105(d) of the Mine Act, 30 U.S.C. § 815(d), states in part:

If, within 30 days of receipt thereof, an operator ... notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104 ... the Commission shall afford an opportunity for a hearing ... and thereafter shall issue an order ... affirming, modifying or vacating the ... order.

5/ "Fire clay" is defined as, "[A]lmost any soft non-bedded clay immediately underlying a coal bed." Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining Mineral and Related Terms 429 (1968).

Mr. Province described the material touching the belt rollers as "muck." He said it was so wet that when he grabbed a handful of the material and squeezed it, it ran through his fingers. He acknowledged, however, that the inspector's observations regarding the float coal and coal dust accumulations were accurate.

The judge found a violation of 30 C.F.R. § 75.400 based upon the existence of accumulations of loose coal, coal dust and float coal dust. 5 FMSHRC at 778. Regarding the accumulations of coal dust and float coal dust, the judge noted that the Secretary established by credible evidence the existence of the accumulations and that Black Diamond did not dispute their existence as cited by the inspector. The judge concluded that this alone was enough to sustain the violation. 5 FMSHRC at 778. The judge also found that the Secretary established, through the inspector's testimony, the presence of the accumulations of loose coal. 5 FMSHRC at 778-79.

Black Diamond challenges the judge's conclusion that it violated section 75.400 on two grounds. Black Diamond argues there was no accumulation of coal dust or float coal dust, and it contends that the accumulations of loose coal were not combustible. We reject both arguments.

The inspector observed and precisely described the presence of coal dust and float coal dust in the middle of the track and on the belt structure. He also described the depth of the float coal dust. Black Diamond's foreman conceded the inspector was not wrong in his description of the coal dust and float coal dust accumulation. Although he later testified that the float coal dust was "showing a good white color" where rock dust had been applied, he did not retract his previous statement that the inspector had not erred in his description of the dust accumulations. The judge found the inspector to be a credible witness. 5 FMSHRC at 779. We find no controverting evidence warranting reversal of this finding and the conclusions based upon it. Cf. *Richard E. Bjes v. Consolidation Coal Co.*, 6 FMSHRC 1411, 1419 (June 1984). We therefore conclude that substantial evidence supports the judge's finding that the accumulations of coal dust and float coal dust existed as described by the inspector and in violation of the standard.

Black Diamond's second argument, that the accumulation of loose coal was not combustible in that it was composed mainly of rock and was too wet to burn requires us to address the meaning of 30 C.F.R. § 75.400. We have previously noted Congress' recognition that ignitions and explosions are major causes of death and injury to miners: "Congress included in the Act mandatory standards aimed at eliminating ignition and fuel sources for explosions and fires. [Section 75.400] is one of those standards." *Old Ben Coal Co.*, 1 FMSHRC 1954, 1957 (December 1979). We have further stated "[i]t is clear that those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe." *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (October 1980). The goal of reducing the hazard of fire or explosions in a mine by eliminating fuel sources is effected by prohibiting the accumulation of materials that could be the originating sources of explosions or fires and by also prohibiting the accumulation of those materials that could feed explosions or fires originating elsewhere in a mine.

Even if, as Black Diamond asserts, the accumulation was damp or wet, it was still combustible. For example, in the case of a fire starting elsewhere in a mine, the heat may be so intense that wet coal can dry out, ignite and propagate the fire. Furthermore, even absent a fire, accumulations of damp or wet coal, if not cleaned up, can eventually dry out and ignite. Also, coal mixed with rock and fire clay can nevertheless burn. A construction of the standard that excludes loose coal that is wet or that allows accumulations of loose coal mixed with noncombustible materials, defeats Congress' intent to remove fuel sources from mines and permits potentially dangerous conditions to exist.

Black Diamond does not dispute the fact that loose coal was present. We conclude that substantial evidence supports the judge's finding that the accumulation of loose coal violated the standard.

Because both of the violations at issue were contained in section 104(d) withdrawal orders, MSHA processed them pursuant to its special penalty assessment procedures. ^{6/} At the hearing Black Diamond unsuccessfully sought to challenge the validity of the special assessments on the ground that they were based on erroneous "unwarrantable failure" determinations. Black Diamond asserts that the inspector made erroneous unwarrantable failure findings with regard to both violations and that the judge's "failure to consider the issue allowed MSHA to propose a special assessment in violation of 30 C.F.R. § 100.5 and the failure requires reversal of the ... judge's decision." Moreover, Black Diamond contends that the judge's refusal to hear evidence regarding unwarrantable failure denied it due process because, "it precluded Black Diamond from contesting the only basis enumerated in 30 C.F.R. § 100.5 that allegedly existed to justify the proposed special assessments." Thus, Black Diamond's attempt to challenge the unwarrantable failure findings in this proceeding is based solely on the impact of those findings upon the penalties proposed by the Secretary for the violations.

It has repeatedly been held that the Mine Act requires in all contested civil penalty cases that the Commission make an independent penalty determination and assessment, based solely upon the statutory criteria of section 110(1) of the Act. See e.g., Secretary of Labor on behalf of Milton Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2042, 2044-46 (December 1983); Sellersburg Stone Co., 5 FMSHRC 287, 291 (March 1983),

^{6/} 30 C.F.R. § 100.5 provides in part:

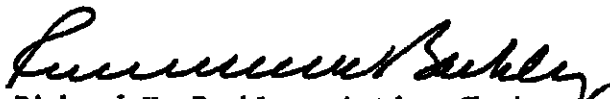
MSHA may elect to waive the regular assessment formula (§ 100.3) or the single assessment provision (§ 100.4) if the agency determines that conditions surrounding the violation warrant a special assessment. ... [T]he following categories will be individually reviewed to determine whether a special assessment is appropriate: ... Unwarrantable failure to comply with mandatory health and safety standards.

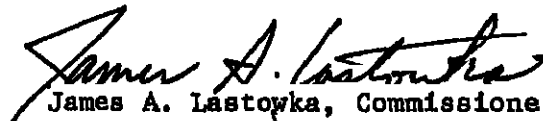
aff'd 736 F.2d 1147 (7th Cir. 1984); Knox County Stone Co., Inc., 3 FMSHRC 1895, 1896-98 (August 1981); Shamrock Coal Co., 1 FMSHRC 469 (June 1979), aff'd 652 F.2d 59 (6th Cir. 1981). The separate procedures by which penalty assessments are proposed by the Secretary of Labor are not material to a penalty assessment by the Commission. We have stated, "The Act does not condition the penalty assessment authority and duties of the Commission upon the manner in which the Secretary ... has chosen to implement his statutory responsibility for proposing penalties. Therefore, it is irrelevant to the Commission for penalty assessment purposes whether a penalty proposed by the Secretary ... was processed under § 100.3, § 100.4 or § 100.5 of the Secretary's regulations." United States Steel Mining Co., Inc., 6 FMSHRC 1148, 1150 (May 1984) (emphasis deleted).

The terms "unwarrantable failure" and "negligence" are not used synonymously in the Mine Act. A finding by an inspector that a violation has been caused by an operator's unwarrantable failure to comply with a mandatory health or safety standard may trigger the increasingly severe enforcement sanctions of section 104(d). 30 U.S.C. § 814(d). Negligence, on the other hand, is one of the criteria that the Commission must consider in assessing a civil penalty for a violation of the Act or of a mandatory health or safety standard. 30 U.S.C. § 820(i). Although the same or similar factual circumstances may be included in the Commission's consideration of unwarrantable failure and negligence, the issues are distinct. At the hearing and in his decision the judge carefully distinguished the issue of unwarrantable failure from negligence. The judge properly declined to address the issue of unwarrantable failure in the context of penalty assessments. Rather, the judge made required findings regarding each of the statutory penalty criteria. With respect to the negligence criterion, he concluded that the violations resulted from Black Diamond's "ordinary negligence" in that Black Diamond failed to exercise reasonable care to insure that the cited accumulations were cleaned up and that it likewise failed to exercise reasonable care to comply with its roof control plan. 5 FMSHRC at 780, 781. The judge afforded Black Diamond the requisite opportunity to present evidence with regard to negligence as well as the other statutory penalty criteria. This is what the Mine Act requires. 7/

7/ The issue Black Diamond raises -- the impact of special findings in a withdrawal order upon a civil penalty proposed by the Secretary for the violation alleged in the order -- is different than the issue of whether the merits of such special findings may be challenged in a civil penalty proceeding when the operator has not sought review of the order pursuant to section 105(d). We leave consideration of the latter issue to a case in which it is squarely presented.

Based on the foregoing reasons, we affirm the decision of the judge. 8/


Richard V. Backley, Acting Chairman


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

8/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 5, 1985

SECRETARY OF LABOR :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. PENN 83-129
 :
v. :
 :
UNITED STATES STEEL MINING CO., :
INC. :

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This consolidated proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act") presents two issues: (1) whether substantial evidence supports a Commission administrative law judge's findings that United States Steel Mining Company's ("U.S. Steel") violation of its ventilation and methane and dust control plan was not "significant and substantial," and (2) whether substantial evidence supports the judge's finding that U.S. Steel violated 30 C.F.R. § 75.200, the mandatory standard governing roof control and roof control plans. 1/ For the reasons that follow, we

1/ 30 C.F.R. § 75.200, which is identical to section 302(a) of the Mine Act, provides:

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No

(footnote 1 continued)

reverse the judge's finding that the violation of the ventilation and methane and dust control plan was not significant and substantial, vacate the judge's conclusion that U.S. Steel violated section 75.200, and remand for further proceedings consistent with this decision.

On January 24, 1983, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation to U.S. Steel pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), during an inspection of U.S. Steel's Maple Creek No. 2 Mine. The citation charged U.S. Steel with a violation of 30 C.F.R. § 75.316, a mandatory safety standard requiring an operator to have an MSHA approved ventilation and methane and dust control plan for its mine. ^{2/} During the inspection, the inspector calculated the volume of air in the face area of a section where mining was about to begin to be 3,600 cubic feet per minute ("cfm"). He reminded U.S. Steel's section foreman that once mining started U.S. Steel's ventilation plan required an air volume of 5,000 cfm and he left the area.

When the inspector returned to the section, mining had commenced. He noticed dust "rolling back" over the operator of the continuous miner. The inspector calculated the volume of air in the face area to be 2,400 cfm. He also found a methane concentration of .1%. The inspector issued a citation alleging a violation of 30 C.F.R. § 75.316. The citation alleged that U.S. Steel was not complying with its ventilation

Footnote 1 end.

person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

^{2/} 30 C.F.R. § 75.316, which repeats section 303(o) of the Mine Act, 30 U.S.C. § 863(o), provides:

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

plan in that "only 2,400 cfm of air was reaching the end of the line curtain [at the face] ... while coal was being mined with a continuous mining machine...." The inspector checked the "significant and substantial" block on the citation form. 3/ The violation was abated after repairs to the line curtain were made and the air volume in the face area was elevated to 5,700 cfm.

At the hearing the inspector explained why he found U.S. Steel's violation of its ventilation plan to be "significant and substantial." He noted that the mine is considered a "gassy" mine because it liberates over one million cubic feet of methane in a 24 hour period. 4/ He testified that he was concerned that improper ventilation would cause methane, which is naturally liberated in the mine, particularly when coal is cut, to accumulate to dangerous levels. He stated that the arcing and sparking of the continuous miner bits as they cut coal at the face could ignite the methane. He also testified that he believed an ignition or fire was reasonably likely to occur. Further, the inspector

3/ Section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1) provides in part:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act....

(Emphasis added).

4/ Pursuant to section 103(i) of the Mine Act, 30 U.S.C. § 813(i), the mine is subject to a spot inspection every five days. Section 103(i) of the Mine Act provides in part:

Whenever the Secretary finds that a coal or other mine liberates excessive quantities of methane ... during its operations, ... he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine during every five working days at irregular intervals. For purposes of this subsection, "liberation of excessive quantities of methane or other explosive gases" shall mean liberation of more than one million cubic feet of methane or other explosive gases during a 24-hour period....

noted in the subject citation that if methane ignition or fire occurred, any miner in the area could be permanently disabled. The inspector acknowledged that it would take a minimum methane accumulation of 5% for an ignition or an explosion to occur and that he had detected a methane level of .1% when he cited the violation. However, he stated that with the reduction of air quantity from the required 5,000 cfm to 2,400 cfm, the chance of a methane accumulation on the section had increased and, as a result, the exposure of miners to ignition and fire hazards increased.

The administrative law judge affirmed the violation of the ventilation plan but vacated the inspector's significant and substantial finding. The judge found that the violation was caused by a collapse of a part of the line curtain on the section. He noted that the resulting interruption of the air flow was not detected by miners in the work area. The judge also noted that when the foreman was advised by the inspector of the insufficient quantity of air, the foreman immediately determined the cause of the violation and corrected it. The judge therefore concluded, "given these circumstances, I fail to understand how the inspector could conclude that an injury or accident was likely to occur. Here, both the inspector and the foreman were both aware of the problem from the outset, and steps were quickly taken to correct the problem." 6 FMSHRC at 1711-12. The judge determined that the inspector's finding must have been based on the inspector's belief that all violations of a mine's ventilation plan are significant and substantial.

On review, the Secretary challenges the judge's conclusion that U.S. Steel's violation of its ventilation plan was not significant and substantial. The Secretary argues that the violation contributed to a hazard because if the concentration of methane gas had increased to explosive quantities, the inadequate ventilation combined with the ignition source could have caused a methane ignition or a fire at the face. Further, the Secretary argues that given these conditions an ignition or fire was reasonably likely to occur and that the resulting injuries would have been serious.

We have held previously that a violation is properly designated significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), we explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Co., Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574-75 (July 1984). Applying these principles to the instant case, we conclude that the judge erred in holding that U.S. Steel's violation of 30 C.F.R. § 75.316 was not significant and substantial.

Neither party disputes that U.S. Steel violated 30 C.F.R. § 75.316. Indeed, the violation--a measured air quantity of 2,400 cfm--represented a major departure from the minimum air quantity of 5,000 cfm required under U.S. Steel's ventilation plan.

With respect to the discrete hazard contributed to by the violation, we have recently emphasized that the hazards associated with inadequate ventilation, especially at working faces, are among the most serious in mining. Monterey Coal Co., Inc., 7 FMSHRC ____, FMSHRC Docket No. LAKE 83-61, slip op. at 5 (July 2, 1985). In enacting the ventilation requirements of the Mine Act, Congress mandated that in all active workings of a coal mine, "the volume and velocity of the current air shall be sufficient to dilute, render harmless, and to carry away, flammable, explosive, noxious, and harmful gases, and dust, and smoke and explosive fumes" and that "[t]he minimum quantity of air in any coal mine reaching each working face shall be three thousand cubic feet a minute." Section 303(b) of the Mine Act, 30 U.S.C. § 863(b). 5/ As stated in Monterey Coal Company:

A basic reason for this requirement is the grave danger that, if there is not adequate ventilation, ignitions or explosions can result from concentrations of explosive gases like methane, either alone or mixed with coal dust, liberated during mining operations. Moreover, we note that when coal is freshly cut, methane can be liberated in dangerous amounts in short periods of time. Although methane itself becomes explosive at a 5% concentration, even a smaller percentage concentration of the gas mixed with fine coal dust can generate an explosion.

Monterey Coal Co., supra, slip op. at 5.

5/ We note that the minimum volume of air required under U.S. Steel's plan, 5,000 cfm, is substantially more than the minimum volume required under the Act. Because a coal mine's ventilation plan must be "suitable to the conditions" of the mine, the particular conditions at Maple Creek No. 2 mine apparently require the greater volume of air specified in U.S. Steel's plan.

The Maple Creek No. 2 mine liberates more than one million cubic feet of methane during a 24-hour period. The mine is under the spot inspection cycle mandated by section 103(i) of the Mine Act. 30 U.S.C. § 813(i). The citation was issued at the face where coal was being cut with a continuous miner. The continuous miner, the operation of which may cause arcing and sparking, was a possible ignition source. Thus, the record clearly sets forth a discrete safety hazard contributed to by the violation -- the possible accumulation of methane in the presence of a potential ignition source.

Although the judge "fail[ed] to understand how the inspector could conclude that an injury or accident was likely to occur," we find that the inspector's conclusion was valid. U.S. Steel contends that at the time the citation was issued there was no chance of a methane ignition or explosion because methane ignites when it reaches a concentration of 5% to 15% of the mine's atmosphere, and that here the methane level was well below 5%. While it is true that methane measured in the section revealed a nonhazardous accumulation at the time the citation was issued, an evaluation of the reasonable likelihood of injury should be made "in terms of continued normal mining operations." U.S. Steel Mining Co., Inc., 6 FMSHRC at 1574. The fact that the methane was low when the violation was cited is not fatal per se to the establishment of "reasonable likelihood." If normal mining operations were to continue, a rapid buildup of methane could reasonably be expected. As we have noted, when coal is being cut it can liberate dangerous levels of methane in a relatively short period. Here coal was being cut and the velocity of air was well below the required level.

We likewise believe that given the ignition source provided by the operation of the continuous miner, ignition of methane could reasonably be expected to occur. We note in particular the testimony of U.S. Steel's section foreman that the mine had experienced "a few" methane ignitions in the past. Thus, in terms of continued normal mining operations, we conclude that the evidence supports a finding that there was a reasonable likelihood that the hazard contributed to -- the accumulation of methane -- could result in the occurrence of an ignition and a fire. If a methane ignition or fire occurred, the injuries produced could be of a reasonably serious nature.

Regarding the judge's expressed belief that the inspector's significant and substantial finding was predetermined, regardless of whether the inspector's finding was based on his belief that all ventilation plan violations are significant and substantial, the question must be resolved on the basis of the circumstances as they existed at the time the violation was cited and as they might have existed had normal mining operations continued. Further, the fact that upon being told of a deficiency by an MSHA inspector an operator proceeds to make necessary corrections, does not obviate the need for determining whether an injury would have been reasonably likely to occur if mining operations had continued without the inspector's intervention. U.S. Steel Mining Co., supra.

Therefore, we conclude that on the facts presented the violation was properly designated significant and substantial by the inspector. Accordingly, the judge's contrary finding is reversed and the citation is remanded for the reconsideration and assessment of an appropriate civil penalty.

We now turn to the alleged violation of 30 C.F.R. § 75.200. On January 12, 1983, during an inspection of the Maple Creek No. 2 Mine, an MSHA inspector noticed that in one of the working sections a short cut of approximately 12 feet had been mined out and that, in accordance with U.S. Steel's roof control plan, three ventilation jacks, (A, B, and C on Exh. R-3, page 2), had been set along the left rib in preparation for roof bolting. The inspector then observed miners install a hydraulic roof jack (No. 2 on Exh. R-3, page 2) in the center of the entry, seven and one half feet from the second ventilation jack and five and one half feet from the last row of permanent supports. U.S. Steel's roof control plan states that the maximum allowable spacing between jacks is five feet.

After jack No. 2 was installed, the inspector testified that he witnessed two miners each pick up a hydraulic jack and proceed in by under unsupported roof for four feet and begin to simultaneously install the jacks. (Nos. 4 and 6, Exh. R-3, page 2). U.S. Steel's section foreman, who also witnessed the event, agreed that the two miners proceeded past jack No. 2, but testified that they proceeded under unsupported roof for only six inches to one foot. Neither the inspector nor the section foreman measured the distance.

The inspector immediately ordered the two miners out of the section. The inspector reviewed with them the requirements of the mine's roof control plan. He explained that the plan requires that after the ventilation jacks are in place, temporary jacks are to be installed from left to right, across the entry of the mine, one at a time. Then, the inspector explained, the plan requires the second row of temporary jacks to be installed exactly like the first, from left to right, one jack at a time. The inspector then issued a citation alleging a violation of 30 C.F.R. § 75.200. The citation stated in part:

The approved roof control plan was not being complied with ... as temporary roof supports (jacks) were not installed according to the roof control plan as center jack was installed first and installed two jacks a[t] same time.
[Sic.]

The inspector further found that the violation was significant and substantial. The citation was abated when the miners set a jack on the left of jack No. 2 and a jack on the right side of jack No. 2, and then installed the second row of jacks in accordance with the inspector's instructions.

At the hearing the inspector testified that he determined that U.S. Steel was out of compliance with its roof control plan for three reasons: (1) the jacks were set out of sequence; (2) two jacks were set simultaneously; and (3) the miners attempting to install jacks No. 4 and No. 6 were under unsupported roof. The inspector admitted that the citation in question did not explicitly describe the miners' presence under unsupported roof. He explained, however, that the citation's statement that the "approved roof control plan was not being complied with" encompassed the fact that the two miners were under unsupported roof.

In his decision, the judge described the issue before him as "whether [U.S. Steel] has violated any specific portion of its approved roof control plan, and ... absent a violation of the plan, was there a violation of section 75.200, when the two miners proceeded to install the two jacks in question." 6 FMSHRC at 1682. The judge concluded that the Secretary had not proven that U.S. Steel had violated its roof control plan. He found that although the citation states that two jacks were not installed in sequence, that practice was not prohibited by the approved roof control plan. 6 FMSHRC at 1683. He also found, however, that although the miner who installed jack No. 4 was protected by the rib jacks and the permanent roof supports, and hence was under supported roof, the miner who "walked out with the intent to install roof jack No. 6 ... was in fact under unsupported roof," and therefore in violation of 30 C.F.R. § 75.200. 6 FMSHRC at 1683-84.

The judge further concluded that this violation was not "significant and substantial." He took into consideration the fact that the adjacent roof area was bolted, that additional support was provided along the left rib by means of roof jacks, that the miner was under unsupported roof for "at most a few seconds," and that "given the fact that MSHA itself conceded that miners must go under unsupported roof to install roof supports," the inspector's significant and substantial finding was made "simply because it involved roof support." 6 FMSHRC at 1711.

On review, U.S. Steel asserts that the judge erred in affirming a violation of 30 C.F.R. § 75.200 after ruling that it had not violated its roof control plan. The company argues that the citation in question was issued for a violation of its roof control plan, not, as the judge found, for violation of section 75.200's general prohibition against persons proceeding beyond the last row of permanent roof supports unless adequate temporary support is provided.

The Secretary argues that U.S. Steel violated the roof control plan as alleged in the citation in that the roof control plan requires that the jacks be installed sequentially and the evidence supports a finding that the jacks were not being so installed. The Secretary also contends that the record establishes that both miners were under unsupported roof. Further, the Secretary argues, the administrative law judge erred in concluding that the violation of the plan was not "significant and substantial."

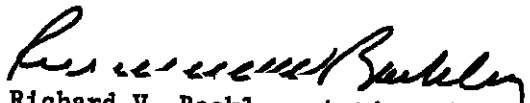
The citation issued by the inspector asserted that the roof control plan was violated in that the temporary jacks were not installed in accordance with the approved plan. According to the inspector, the plan was violated when temporary jacks were set out of sequence and two temporary jacks were set simultaneously. The inspector testified that the roof control plan requires that temporary jacks be set from rib to rib, one jack at a time. On the other hand, U.S. Steel's chief mine inspector, who participated in the roof control plan adoption/approval process, testified that the plan requires that the temporary jacks be set by rows, but does not require that they be set sequentially.

The judge's decision does not resolve this conflict as to the meaning of the roof control plan. Instead, after setting forth the conflicting evidence in great detail, the judge simply labelled it "confusing" and summarily concluded that a violation of the plan had not been established.

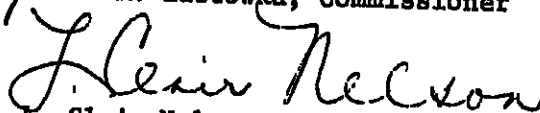
The statute and the standard require the parties to agree on a roof control plan. Once the operator has adopted and MSHA has approved the plan, its provisions are enforceable as though they were mandatory standards. *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 409 (D.C. Cir. 1976). Thus, a question concerning the parties' intent and understanding as expressed in an approved plan is an important one. Before we can undertake to determine whether a plan was violated, we first need findings as to what the plan requires. *Shamrock Coal Co.*, 5 FMSHRC 845, 848-52 (May 1983); *Penn Allegh Coal Co.*, 3 FMSHRC 2757, 2769-70 (December 1981). Only after this is determined can those requirements be applied to particular facts to resolve whether a violation of the plan has occurred. Id.

We therefore vacate the judge's conclusion that section 75.200 was violated even though the roof control plan was not. We remand this citation so that the judge may make the necessary further findings regarding whether the roof control plan imposes specific requirements as to the sequence in which temporary jacks must be set and, if so, whether such requirements were violated here.

In sum, we reverse the judge's conclusion that U.S. Steel's violation of its ventilation plan was not "significant and substantial" and remand for assessment of an appropriate penalty. We vacate the judge's finding that 30 C.F.R. § 75.200 was violated and remand for further findings consistent with this decision. 6/


Richard V. Backley, Acting Chairman


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

6/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 5, 1985

UNITED MINE WORKERS OF AMERICA	:	
(UMWA)	:	
ON BEHALF OF JAMES ROWE, <u>et al.</u> ,	:	Docket Nos. KENT 82-103-D
	:	KENT 82-105-D
JERRY D. MOORE	:	KENT 82-106-D
LARRY D. KESSINGER	:	
	:	
v.	:	
	:	
PEABODY COAL COMPANY	:	
	:	
and	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
ON BEHALF OF THOMAS L. WILLIAMS	:	Docket No. LAKE 83-69-D
	:	
v.	:	
	:	
PEABODY COAL COMPANY	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

An inquiry has been conducted to determine whether Commission Administrative Law Judge Joseph B. Kennedy, while presiding in the captioned proceedings, acted improperly by: (1) engaging in a prohibited ex parte communication; (2) verbally abusing attorneys appearing before him; (3) threatening the Secretary's counsel; and (4) commenting publicly on a pending proceeding. In the instances and on the grounds explained below, we conclude that Judge Kennedy's conduct was improper and is cause for serious concern.

This inquiry arises in connection with discrimination complaints filed under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), against Peabody Coal Company ("Peabody") by the United Mine Workers of America ("UMWA") on behalf of James Rowe and others and by the Secretary of Labor on behalf of Thomas L. Williams. These complaints alleged that certain of Peabody's policies relating to the training and recall of laid-off miners violated the Mine Act. By order dated June 18, 1984, we severed this inquiry from the merits of these cases. The procedural events relevant to this inquiry are summarized below.

The underlying discrimination complaints were consolidated before Judge Kennedy and all parties cross-petitioned for summary decision. On April 24, 1984, Judge Kennedy issued an order denying the motions for summary decision. The Secretary of Labor petitioned the Commission for interlocutory review of the judge's order. Thereafter, the Commission received a letter dated May 17, 1984, from Francis X. Lilly, Solicitor of the Department of Labor. In his letter, the Solicitor asserted that on April 11, 1984, Judge Kennedy initiated an ex parte telephone conversation with a Department attorney, Linda Leasure, and that during the conversation the judge discussed the merits of the Peabody cases. The letter also complained of abusive conduct by Judge Kennedy toward the Secretary's counsel of record, Frederick W. Moncrief, and toward counsel for the UMWA and Peabody at an oral argument held before the judge on April 12 and 13, 1984. Finally, the Solicitor asserted that Judge Kennedy had threatened Mr. Moncrief in a separate incident occurring on April 19, 1984. The letter was accompanied by affidavits from Ms. Leasure and Mr. Moncrief, and by portions of the transcript of the oral argument of April 12 and 13, 1984.

By order dated May 18, 1984, the Commission deemed the Solicitor's letter and the accompanying materials to be, in part, a notification of a prohibited ex parte communication and a request for appropriate action under Commission Procedural Rule 82. 29 C.F.R. § 2700.82. 1/ Accordingly, copies of the Solicitor's letter and the accompanying materials were placed in the record and were served on all parties and on Judge Kennedy.

1/ Rule 82 states:

(a) Generally. There shall be no ex parte communication with respect to the merits of any case not concluded, between the Commission, including any member, Judge, officer, or agent of the Commission who is employed in the decisional process, and any of the parties or intervenors, representatives, or other interested persons.

(b) Procedure in case of violation. (1) In the event an ex parte communication in violation of this section occurs the Commission or the Judge may make such orders or take such action as fairness requires. Upon notice and hearing, the Commission may take disciplinary action against any person who knowingly and willfully makes or causes to be made a prohibited ex parte communication.

(2) All ex parte communications in violation of this section shall be placed on the public record of the proceeding.

(c) Inquiries. Any inquiries concerning filing requirements, the status of cases before the Commissioners, or docket information shall be directed to the Office of the Executive Director of the Commission....

29 C.F.R. § 2700.82.

The Commission granted the Secretary of Labor's petition for interlocutory review, vacated the judge's order of April 24, 1984, and re-assigned the Peabody cases to the Commission's Chief Administrative Law Judge for disposition. The Commission stated:

We take this action to avoid either the appearance or existence of judicial bias. Apparently, [Judge Kennedy] and counsel have become involved in a controversy which is evidenced by the transcript of oral argument held before the judge on April 12 and 13, 1984, and the letter and supporting affidavits filed with the Commission by the Solicitor of Labor on May 17, 1984....

The record before us as to the relations between the judge and all counsel to the parties indicates that the rights of the parties, the expedition of the proceedings, and the policies of the Commission would be better served by a reassignment of these matters. Cf. Taylor v. Hayes, 418 U.S. 488 (1974); Offutt v. United States, 348 U.S. 11 (1954); Chocallo v. Bureau of Hearings and Appeals, 548 F. Supp. 1349, 1362 (E.D. Pa. 1982).

The Commission also severed the allegations of judicial misconduct from the merits of the proceedings and retained jurisdiction over those allegations for further consideration.

We subsequently directed Judge Kennedy to submit for inclusion in the record his affidavit concerning the telephone conversation with Ms. Leasure of April 11, 1984, and the incident involving Mr. Moncrief on April 19, 1984. We also noted that on May 27, 1984, an article appeared in the Lexington [Kentucky] Herald-Leader entitled "Mine Safety Judge Walks Controversial Path," in which the judge was quoted, inter alia, as characterizing the telephone conversation with Ms. Leasure as a trivial incident and making critical comments regarding Mr. Moncrief. We stated:

Because of our concern that the Commission's judges abide by standards of proper judicial conduct, we find it appropriate to direct the judge to disclose in his sworn statement whether he discussed the Solicitor's letter to the Commission, the telephone conversation of April 11, 1984, [and] the incident of April 19, 1984, with the author of the article, Michael York, or other persons in connection with the article printed in the Lexington Herald-Leader. If such a

discussion or such discussions took place, we further direct that the statement disclose the substance of the discussion or discussions, and whether the administrative law judge is quoted accurately in the article.

In response, Judge Kennedy moved for dismissal of this inquiry and for a stay of the order directing the filing of his affidavit. The judge asserted, inter alia, that the Commission inquiry was "plainly disciplinary in nature" and that the Commission was "without jurisdiction to take disciplinary action against an administrative law judge for any matter involving the exercise of [a judge's] judicial responsibilities unless it has filed a complaint with the Merit Systems Protection Board...." In an order issued March 15, 1985, we denied the judge's motion. We stated:

Before this Commission undertakes to discipline, or seek discipline of, an administrative law judge it needs first to determine whether any disciplinary action is required. The Commission has followed, and will continue to follow, appropriate procedures in seeking to examine the allegations of misconduct that have been raised in this matter. If the Commission later determines that grounds exist for forwarding this matter to the Merit Systems Protection Board, it will do so. [2/]

2/ The Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111 (1978), empowered the Merit Systems Protection Board ("MSPB") to hear and decide an employing agency's complaint proposing designated types of adverse action against an administrative law judge. 5 U.S.C. § 7521 (1982). We need not decide at this time whether section 7521 preemptively reserves MSPB jurisdiction over all forms of disciplinary action against an administrative law judge. As noted in our March 15, 1985 order, however, before an agency "undertakes to discipline, or seek discipline of, an administrative law judge," it needs first to engage in an appropriate process designed to determine whether discipline is warranted. Cf. Ass'n of Administrative Law Judges v. Heckler, 594 F. Supp. 1132, 1140 (D.D.C. 1984).

Judge Kennedy's subsequently filed affidavit was placed in the record and copies were provided to the parties. ^{3/} We thereafter accepted for filing affidavits from Mr. Moncrief and Cynthia A. Attwood, the Department of Labor's Associate Solicitor for Mine Safety and Health, responding to points raised in Judge Kennedy's affidavit.

We examine separately the allegations of improper conduct.

I. Ex parte communication

While serving as the presiding administrative law judge in the Peabody litigation, Judge Kennedy, by order dated February 9, 1984, directed the Secretary of Labor to explain why he had not sought temporary reinstatement for complainant Thomas L. Williams pursuant to section 105(c)(2) of the Mine Act. 30 U.S.C. § 815(c)(2). Counsel for the Secretary, Mr. Moncrief, filed a response explaining that it was the Secretary's position that because Mr. Williams was laid-off when the alleged discriminatory act occurred, Mr. Williams was not a "miner" entitled to temporary reinstatement. Following receipt of the Secretary's response, Judge Kennedy scheduled oral argument on the motions for summary decision for April 12, 1984.

The Solicitor asserts that on April 11, 1984, one day prior to the scheduled oral argument, Judge Kennedy telephoned Linda Leasure, an attorney on the Solicitor's appellate staff. The Solicitor states that Judge Kennedy asked Ms. Leasure detailed questions regarding the position taken in a brief she had written that had been filed by the Secretary of Labor in an appeal pending in the United States Court of Appeals for the Tenth Circuit, Emery Mining Corp. v. Secretary of Labor, etc., No. 83-2017. ^{4/} In describing Judge Kennedy's conversation with Ms. Leasure, the Solicitor states in his letter:

^{3/} In filing his affidavit, Judge Kennedy moved for a protective order to shield his affidavit from disclosure "to anyone other than Commission members, except upon notice to the Judge of any proposed disclosure and opportunity for him to respond to any such proposed disclosure." We denied the judge's motion in an order issued on March 28, 1985, and directed that the judge's affidavit be placed in the official public record at the close of business on April 3, 1985. No response to this order was received and, accordingly, on April 3rd the judge's affidavit was placed in the record and served on the parties.

^{4/} This case involves review of the Commission's decision in Secretary of Labor on behalf of Bennett, etc. v. Emery Mining Corp., 5 FMSHRC 1391 (August 1983). In Emery, the Commission held that the operator's hiring policy of requiring job applicants to have 32 hours of miner training as a qualification for employment was not, per se, a violation of the Mine Act, but that the operator's refusal to reimburse individuals for the cost of such training after hiring them, while relying on such training to satisfy the miner training requirements of section 115 of the Mine Act, 30 U.S.C. § 825, did violate the Act. 5 FMSHRC at 1394-97.

The judge attempted to get ... Ms. Leasure ... to respond to hypothetical questions regarding the Secretary's position on fulfilling the Mine Safety and Health Administration's training requirements in layoff situations. [The judge] asserted that the Solicitor had conflicting positions in the [Peabody litigation and in the Emery case in the 10th Circuit], demanded to know how Ms. Leasure planned to deal with that conflict in the Tenth Circuit and implied that [in the Peabody litigation] the Solicitor's Office had seriously misrepresented the [Secretary's] true position.

In her affidavit Ms. Leasure describes in detail the telephone conversation with Judge Kennedy. Ms. Leasure states that she received the telephone call from Judge Kennedy on April 11, 1984, and that the judge explained that he wanted to understand more fully the Secretary's position before the Tenth Circuit in Emery. Ms. Leasure asserts that Judge Kennedy inquired about a portion of the Secretary's brief discussing the Commission's conclusion in its Emery decision that applicants for employment were not discriminated against by Emery's hiring policy. According to Ms. Leasure, Judge Kennedy asked if that portion of the brief had been reviewed and approved, and averred that he had cases before him in which the Secretary of Labor had taken an opposite position. Ms. Leasure states, "At this point in the telephone conversation the judge neither identified the specific cases in which [the Secretary] purportedly had taken contrary positions, nor named the attorneys or offices handling the cases." Ms. Leasure relates that she told the judge the Emery brief had been reviewed and approved and that she was not aware of any conflict in the Secretary's position. Ms. Leasure asserts that Judge Kennedy insisted that there was a case in which the Secretary was taking an inconsistent position, and inquired how this inconsistency would be explained to the court of appeals. Ms. Leasure states that Judge Kennedy criticized the Secretary's litigation strategy in the Emery appeal and then posed various hypothetical questions concerning what the Secretary's position would be with respect to laid-off miners if reemployment decisions were premised upon training mandated by the Mine Act. Ms. Leasure states that when she realized that Judge Kennedy's hypothetical questions resembled the case that Mr. Moncrief was scheduled to argue before the judge the next day, she asked if that was the matter to which he was referring. When he told her that it was, she terminated the conversation.

In his affidavit describing the telephone conversation Judge Kennedy states:

I ... pointed out to Ms. Leasure what I perceived to be a conflict between her position and that of Mr. Moncrief. I told her that in his

brief before me Mr. Moncrief had sought to justify the Solicitor's refusal to temporarily reinstate Williams on the ground that he was not a "miner," ... because at the time he was bypassed for [rehire] ... he was not actively employed in a mine. At first Ms. Leasure led me to believe that she had never really thought about the conflict I perceived between her brief and that of Mr. Moncrief. Then she said she thought they might be distinguished factually and legally because the question of temporary reinstatement had not come up in the Emery case. When I pressed her ... she became flustered and nonplussed with my questions.

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I told Ms. Leasure I could not understand how the Secretary could represent to the Tenth Circuit that an individual with no mining experience was entitled to be accorded the status of a "new miner" [while] an experienced miner like Mr. Williams was not to be considered a miner at all. At this point, if I recall correctly, Ms. Leasure became quite defensive and accused me of attempting to open a "pandora's box" and "prying into internal policies and deliberations" that were really none of my business. I thanked her for her time and attention and terminated the conversation which had lasted about five minutes.

This version of the contents of the telephone conversation was, in general, repeated by Judge Kennedy at the oral argument held before him on April 12, 1984. Tr. I 72-73.

Commission Rule 82 (n. 1 supra) and section 557(d) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 557(d)(1982), prohibit ex parte communications between a Commission judge and a party regarding the merits of a pending case. T.P. Mining, Inc., 7 FMSHRC ____ (FMSHRC Docket No. LAKE 83-97-D, July 10, 1985), slip op. at 5-6; United States Steel Corp., 6 FMSHRC 1404, 1407-09 (June 1984); Knox County Stone Co., Inc., 3 FMSHRC 2478, 2482-86 (November 1981). 5/ It is clear that the

5/ Section 551(14) of the APA, 5 U.S.C. § 551(14) (1982), defines "ex parte communication" as:

an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding....

telephone conversation of April 11 between Judge Kennedy and Ms. Leasure was ex parte. The conversation involved only Judge Kennedy and an attorney employed by the Secretary of Labor, a party to the Peabody litigation. The telephone conversation was not on the record, and was made without notice to counsel for the other parties, or even to counsel of record for the Secretary, Mr. Moncrief.

Regardless of whether the conversation took place precisely as described by Ms. Leasure or by Judge Kennedy, it is clear that the communication concerned the merits of the Peabody litigation. The concept of the "merits of a case" is construed broadly and, at the very least, includes discussion of the issues in a case and how those issues should or will be argued and resolved. T.P. Mining, supra, slip op. at 5, 7; Knox County, supra, 3 FMSHRC at 2485. Moreover, any ex parte communication that might influence the substantive outcome of a proceeding pertains to the merits of a case and, thus, is prohibited. T.P. Mining, slip op. at 7, citing PATCO v. FLRA, 685 F.2d 547, 563 (D.C. Cir. 1982).

In the Peabody cases, the theory of the laid-off complainants' cause of action is that Peabody violated the Mine Act by refusing to rehire them because of their lack of training mandated by section 115 of the Act. 30 U.S.C. § 825. Peabody's defense is that the training provisions do not set employment criteria for laid-off miners. The essence of the April 11 discussion initiated by Judge Kennedy went to the grounds of the complaint and the defense. In addition, according to his own affidavit, Judge Kennedy raised the issue of why complainant Williams was not entitled to reinstatement. The Emery case, about which Judge Kennedy so vigorously questioned Ms. Leasure, had been cited by all of the parties in their motions and supporting memoranda to the judge. Judge Kennedy was gathering off-the-record information from one of the parties that would bear on and influence his evaluation of the parties' arguments with respect to the issues of discrimination and reinstatement presented in the Peabody litigation pending before him. The conversation therefore concerned the merits of the Peabody litigation and was prohibited. The fact that Judge Kennedy initiated the conversation one day prior to the scheduled oral argument in the Peabody matter reinforces this conclusion. 6/

6/ In the Peabody litigation the only attorney to enter an appearance on behalf of the Secretary was Mr. Moncrief. By soliciting information concerning the Secretary's position from another Department of Labor attorney, with the apparent object of exploring what the judge perceived as weaknesses in the Secretary's position, the judge denied the Secretary his right to a hearing conducted in a fair and appropriate adversarial framework.

We also conclude that Judge Kennedy "knowingly and willfully" engaged in this prohibited communication. See 29 C.F.R. § 2700.82(b)(1). The conversation was intentionally initiated by Judge Kennedy. Judge Kennedy knew what he was discussing and why he was discussing it. Nor was this the first instance in which Judge Kennedy has engaged knowingly and willfully in a prohibited ex parte communication. T.P. Mining, slip op. at 5-8; Cf. United States Steel Corp., 6 FMSHRC 1404, 1408 (June 1984).

We also conclude that although Ms. Leasure was a party to the prohibited communication, her participation was not knowing and willful within the meaning of Commission Rule 82. Ms. Leasure was not the attorney of record in the Peabody litigation; she did not initiate the discussion; she was responding to a federal administrative law judge; and she terminated the conversation after realizing that it concerned the merits of the pending Peabody litigation. Moreover, Ms. Leasure's supervisor, the Solicitor, brought the conversation to the Commission's attention. Rather than reflecting adversely upon Ms. Leasure, the conversation presents us with yet another incident of Judge Kennedy initiating a prohibited ex parte communication. T.P. Mining, supra; see Inverness Mining Co., 5 FMSHRC 1384, 1388 n. 3 (August 1983); Knox County, 3 FMSHRC at 2482-86.

II. Abuse of attorneys

We have noted recently that, as an active participant in the adjudicatory process, a Commission judge has a duty to conduct proceedings in a orderly manner so as to elicit the truth and obtain a just result, and that in carrying out this duty a judge may be required to admonish counsel. T.P. Mining, Inc, 7 FMSHRC ____ (FMSHRC Docket No. LAKE 83-97-D, July 2, 1985), slip op. at 5. However, such admonitions are to be couched in temperate language. Id. Patience, dignity and courtesy are not only watchwords of judicial conduct, they are essential cognates of fairness and efficiency. See ABA, Code of Judicial Conduct, Canon 3(A)(3)(1980). 7/ Here, the transcript of the oral argument before Judge Kennedy on April 12 and 13, 1984, reveals comments by the judge to the attorneys that were, at times, sarcastic and demeaning. The judge was extremely critical of all of the attorneys for not being as prepared as he deemed necessary. Tr. II at 70. Although Judge Kennedy stated that "it is time to start applying sanctions," he did not attempt to initiate sanctions by advising the Commission pursuant to Commission Procedural Rule 80, 29 C.F.R. § 2700.80, of any professional misconduct on the part of counsel in this matter.

7/ The ABA's Code of Judicial Conduct has been adopted by the Judicial Conference of the United States for the guidance of federal judges. See Judicial Conference of the United States, Code of Judicial Conduct for the United States Judges (1974).

Judge Kennedy was rude and sarcastic with counsel for the UMWA. At one point in the hearing he repeatedly called upon her to answer a question that he posed. When she did not respond immediately, he asked her, "Do you want a recess and rest? Is it too much of an intellectual strain for you to answer the question?" He added, "Maybe we should get another lawyer over here from the union that can answer my questions." Tr. I at 200-01. When Judge Kennedy and counsel for the UMWA disagreed about which facts were relevant to the UMWA's position, the judge stated, "I think you do your client a disservice when you choose to ignore salient facts that help on the equities." Tr. I at 73. The judge added that he was "a little shocked" to hear what counsel regarded as "relevant." Tr. I at 75. Judge Kennedy was also impatient with and critical of counsel for Peabody. When counsel stated that he did not have a copy of the brief filed by the Secretary in the Emery litigation (to which Peabody was not a party), the judge replied, "I'm getting sick of this. Act like a lawyer, will you?" Tr. I at 170.

Judge Kennedy was also highly critical of counsel for the Secretary, Mr. Moncrief. Mr. Moncrief argued that the judge lacked jurisdiction to inquire into the Secretary's determination not to seek temporary reinstatement for claimant Williams. The judge termed the argument "the most specious [he] had ever heard." Mr. Moncrief responded, "Oh, I'm sure you have heard worse", and the judge replied, "Well, seldom, and you can usually top any one. ... I do wish the Solicitor would send people over here with a little more competence." Tr. II at 72. In addition, Judge Kennedy termed Mr. Moncrief's argument an "intellectually dishonest interpretation of the law," and asserted that the Secretary's decision not to seek reinstatement was "rather outrageous." Tr. I at 115.

The Peabody litigation was complicated, and portions of the record indicate that Judge Kennedy attempted to clarify the issues in order to better manage the forthcoming trial. A judge has "considerable leeway ... in regulating the course of a hearing and in developing a complete and adequate record." Canterbury Coal Co., 1 FMSHRC 335, 336 (May 1979). However, a judge's discretion in this regard is not unlimited. The APA requires that a judge must perform his adjudicative functions "in an impartial manner." 5 U.S.C. § 556(b)(1982). Canon 3(A)(3) of the Code of Judicial Conduct requires that a judge be "patient, dignified and courteous to litigants, ... witnesses, lawyers and others with whom he deals in his official capacity." As the Supreme Court recently observed in In re Snyder, ___ U.S. ___, 53 U.S.L.W. 4833, 4837 (June 25, 1985): "All persons involved in the judicial process -- judges, litigants, witnesses, and court officers -- owe a duty of courtesy to all other participants." Based on the transcript of the oral argument, we conclude that Judge Kennedy's undue impatience, sarcasm, and lack of courtesy toward counsel violated these standards. Judge Kennedy has on more than one occasion, and by more than one tribunal, been found lacking in judicial restraint and temperament. Grundy Mining Co., Inc., v.

Secretary of Labor, Mine Safety and Health Administration, 636 F.2d 1217 (6th Cir. 1981) (unpublished order); Canterbury Coal Co., 1 FMSHRC 1311, 1314 (September 1979). Counsel who appear before this Commission are entitled to be treated in a considerate manner. This Commission is entitled to be represented by a patient, dignified, and courteous judge. See In Re Chocallo, 2 MSPB 28, 62-63 (1980), aff'd mem. sub. nom. Chocallo v. Prokop, Civil Action No. 80-1053 (D.D.C., October 10, 1980), aff'd mem., 673 F.2d 551 (D.C. Cir. 1982). Judge Kennedy's conduct in the present case once again stands in stark contrast to these requirements.

III. Incident of April 19, 1984

The Solicitor states that on April 19, 1984, following the April 12-13 oral argument, a confrontation involving Judge Kennedy and Mr. Moncrief occurred at the Commission's Office of Administrative Law Judges in Falls Church, Virginia. This confrontation involved a dispute over the availability of the transcript of the oral argument. Near the close of the oral argument the judge stated: "I have asked to have the transcript of this argument expedited. And it will be available to the parties next Thursday, April 19." Tr. II at 76. On April 16, 1984, Mr. Moncrief wrote the Commission's Executive Director and requested a copy of the transcript. This letter is in the record. In his affidavit, Judge Kennedy maintains that Mr. Moncrief, in his letter to the Executive Director, misrepresented the judge's instructions regarding the transcript. Judge Kennedy also maintains that Mr. Moncrief persuaded the Executive Director to order the judge's secretary to make a copy of the transcript for Mr. Moncrief. Both Mr. Moncrief and Judge Kennedy agree that Mr. Moncrief came to the Commission's office on April 19 in order to obtain the copy of the transcript. Their sworn accounts as to what then transpired diverge.

Mr. Moncrief states that when he entered the Commission's office, the judge yelled at him and accused him of misleading the Commission with regard to the matter of the transcript. According to Moncrief, the judge exclaimed: "By God now you've done it. You've really done it now boy. You wrote a misleading letter to the Commission and told them I said you could have my copy of the transcript." Mr. Moncrief states that when he left the office, Judge Kennedy followed him to the elevator and shouted at him: "[W]atch your step. You're in my sights!", to which he replied "Keep 'em clear, Judge!"

Judge Kennedy states that prior to seeing Mr. Moncrief on April 19, he was "seriously disturbed by Mr. Moncrief's duplicity" in the matter of the transcript. Judge Kennedy asserts that when Mr. Moncrief appeared he asked him to explain his actions. According to Judge Kennedy, Moncrief "stepped back and stood mute with a contemptuous smirk on his face and when I pursued the matter he turned on his heel and walked out." The judge states that he followed Mr. Moncrief in order to pursue the matter and that Mr. Moncrief stated: "What the hell do you think you can do

about it. You know damn well MSHA and the Commission are out to get you and I intend to do everything I can to help them." Judge Kennedy concludes, "I did not threaten [Mr. Moncrief]. I cautioned him against further provocations and told him ... I would keep an eye on him."

Our examination of Mr. Moncrief's letter to the Commission's Executive Director and the judge's transcribed statement at the oral argument concerning the availability of the transcript reveals no "duplicity" or misrepresentation on the part of Mr. Moncrief. Rather, the record reveals that he followed the Commission's established procedures concerning the Secretary of Labor's procurement of copies of documents, including transcripts, contained in official, public records maintained by the Commission. The fact that the judge may disagree with these procedures, or finds them inconvenient, provides no basis for venting his personal displeasure at the expense of a litigant who properly requests a copy of a document then in the judge's possession. Thus, regardless of whether Judge Kennedy was "seriously disturbed" (as he stated) or was angry (as Mr. Moncrief's affidavit suggests) his negative actions towards Mr. Moncrief were unwarranted.

Apart from this conclusion, we are unable to conclusively resolve in this forum the precise content of the exchange between the two men at the conclusion of their conversation. Although each affidavit contains statements that, if true, are cause for serious concern, our major concern here is over what transpired, both on and off the record, in connection with the merits of the underlying litigation.

We reemphasize, however, that the standards required to be observed by Commission judges mandate dignified and courteous relationships in order to assure the orderliness of proceedings and to protect the rights of all parties. Similar standards are required of those who practice before the Commission. Commission Procedural Rule 80(a), 29 C.F.R. § 2700.80(a). These standards of conduct are not mere social niceties. They serve an important purpose by promoting the rational resolution of legal conflicts by curbing emotional excesses that litigation may engender. When these standards are disregarded, the underpinnings of the judicial system are eroded.

IV. The newspaper article

In directing that Judge Kennedy file a sworn statement regarding the newspaper article of May 27, 1984, published in the Lexington [Kentucky] Herald-Leader, we noted that the judge was quoted as characterizing his telephone conversation with Ms. Leasure as trivial and as being critical of Mr. Moncrief. 8/ In his affidavit, Judge Kennedy

8/ The article states that the judge described his telephone conversation with Ms. Leasure as "absolutely, completely trivial" and that he said of Mr. Moncrief: "He is a lazy lawyer and I'm not surprised that he has nothing better to do than to bring this sort of complaint, I've been in cases in which he is totally unprepared and even argued positions that hurt his own case." York, "Mine Safety Judge Walks Controversial Path," Lexington [Kentucky] Herald-Leader, May 27, 1984, at A-1.

states that he was contacted by several reporters, including Michael York the author of the article, regarding the Solicitor's letter of May 17, 1984. The judge asserts that when Mr. York asked him for comment he said that he believed the charges in the letter were "trumped up"; that he thought the charges with regard to Ms. Leasure and Mr. Moncrief were lacking in substance; and that his official view on the question of Mr. Moncrief's competence was reflected in the record of the oral argument in the Peabody litigation and in his order of April 25, 1984 issued in T.P. Mining, Inc., FMSHRC Docket No. LAKE 83-97-D. 9/ Judge Kennedy also states that he is unable to confirm or deny the accuracy of the quotations.

Canon 3(A)(6), Code of Judicial Conduct, states in part:

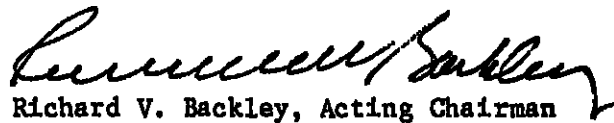
A judge shall abstain from public comment about a pending ... proceeding in any court

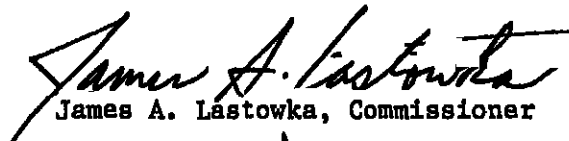
The judge was well aware that the Solicitor's letter and our resulting inquiry arose out of incidents related to the pending Peabody litigation. At the time the article was published Judge Kennedy was the presiding trial judge in the matter. Judge Kennedy's comments concerned that pending litigation in that they related to the judge's ex parte telephone conversation and upon the competence of the Secretary's counsel of record. Moreover, public comment upon the competence of counsel in a proceeding amounts to commenting upon the proceeding itself. Counsel is an indisputable component of any proceeding in which he or she appears. T.P. Mining, supra, slip op. at 7.

The judge states that he told Mr. York that he, the judge, believed the Solicitor's letter represented an attempt "to silence [his] free criticism of the administration's cooperative enforcement policy." Judge Kennedy's motive for granting the interview is irrelevant. The comments concerned a pending proceeding and they were forbidden. Public expressions by judges regarding cases and counsel before them can only mar the judicial body's appearance of impartiality and subject the integrity of its proceedings to question. Kennecott Copper Corp. v. F.T.C., 467 F.2d 67, 80 (10th Cir. 1972).

9/ We granted the Secretary of Labor's petition for discretionary review of the referenced order. We have held that the judge's critical comments regarding Mr. Moncrief lacked record support, and the comments were struck. T.P. Mining, Inc., 7 FMSHRC — (FMSHRC Docket No. LAKE 83-97-D, July 2, 1984), slip op. at 3-6.

The purpose of this inquiry has been to determine whether Judge Kennedy acted improperly in connection with the captioned proceeding. As discussed above we find several instances of improper conduct which are of grave concern. We reserve for further consideration the question of the necessary response to his actions. 10/


Richard V. Backley, Acting Chairman


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

10/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves a panel of three members to exercise the powers of the Commission. Acting Chairman Backley has fully considered the motion of April 3, 1985, filed by Judge Kennedy, wherein the question of "appearance of bias on the part of the Acting Chairman in favor of Mr. Moncrief" is raised. The basis for this motion is a letter written by Acting Chairman Backley on behalf of Mr. Moncrief in his efforts to be certified as an administrative law judge. The letter, addressed to the Office of Personnel Management, is dated July 26, 1982. Acting Chairman Backley has concluded that the letter neither creates a bias nor appearance of bias in favor of Mr. Moncrief so as to warrant his recusal.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 20, 1985

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. WEST 80-6-M
	:	WEST 80-81-M
CALVIN BLACK ENTERPRISES	:	WEST 80-82-M

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). Two questions are presented: first, whether Calvin Black Enterprises ("Black") was properly cited for violations of mandatory safety standards arising from the work activities of an independent contractor; and second, whether Black denied entry at two of its mines to inspectors of the Department of Labor's Mine Safety and Health Administration ("MSHA") in violation of section 103(a) of the Mine Act. 30 U.S.C. § 813(a). 1/ A Commission

1/ Section 103(a) of the Mine Act provides:

Authorized representatives of the Secretary [of Labor] or the Secretary of Health and Human Services shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection,

(footnote 1 continued)

administrative law judge concluded that Black was properly cited for the violations of the safety standards and that Black unlawfully denied MSHA inspectors entry to its mines. 5 FMSHRC 1440 (August 1983)(ALJ). We granted Black's petition for discretionary review. For the reasons that follow, we affirm the judge's decision.

Black is the owner-operator of two underground uranium mines, the Markey and Blue Lizard Mines, located near Blanding, Utah. On May 17, 1979, MSHA Inspector Ronald Beason and an inspector-trainee conducted an inspection of the Markey Mine. During the inspection, the inspectors observed a surveying crew, consisting of a geologist and two helpers, working underground without self-rescue devices. The members of the surveying crew were employees of Sanders Exploration Company ("Sanders"), with whom Black had contracted for surveying and mapping services. Sanders had been conducting surveying and mapping services intermittently for one year. This surveying crew had been working in the mine for two to three days prior to the inspection.

When the inspectors asked the geologist why he was not wearing a self-rescue device, the geologist replied that he had been issued a device but had left it in the crew's jeep, located approximately 750 feet away. The geologist's helpers stated that they had not been issued self-rescue devices or instructed in their use. Inspector Beason issued a citation charging Black with a violation of 30 C.F.R. § 57.15-30. 2/

Footnote 1 end.

no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health and Human Services may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. ... For the purpose of making any inspection or investigation under this Act, the Secretary, ... with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary ..., shall have a right of entry to, upon, or through any coal or other mine.

2/ Section 57.15-30 provides:

Mandatory -- A 1-hour self-rescue device approved by the Mine Safety and Health Administration shall be made available by the operator to all personnel underground. Each operator shall maintain self-rescue devices in good condition.

The citation was terminated when the geologist's helpers were issued self-rescue devices and the members of the surveying crew were instructed in their use.

During the same inspection, Inspector Beason issued another citation alleging that the surveying crew's use of a gasoline-powered jeep in the Markey Mine violated 30 C.F.R. § 57.4-52 because the mine did not have adequate escape routes -- i.e., crosscuts every 100 feet. 3/ This citation was terminated when the jeep was moved to the mine's surface.

Subsequently, on July 2, 1979, Inspector Beason and an MSHA special investigator visited Black's Blue Lizard and Markey mines for the purpose of conducting inspections. When the inspectors arrived at the Blue Lizard Mine, they were informed by the mine superintendent and the foreman that the mine's owner, Mr. Calvin Black, had issued instructions that no one was permitted on mine property without Mr. Black's written permission. The mine personnel showed the inspectors a notice to that effect and told the inspectors that they were trespassing. 4/ Inspector Beason then read to Black's representatives relevant portions of section 103(a) of the Mine Act (see n. 1) and informed them of MSHA's right to inspect the mine and of the consequences of their refusal to permit an inspection. The inspectors testified that they believed that the atmosphere was sufficiently hostile that they would have been prevented physically from entering the mine. Inspector Beason issued Black a citation alleging a violation of section 103(a) of the Mine Act. Approximately 20 minutes later, after once more requesting and being denied permission to inspect, Inspector Beason issued a withdrawal order pursuant to section 104(b) of the Mine Act. 30 U.S.C. § 814(b). Black continued mining operations following issuance of the withdrawal order.

3/ Section 57.4-52 provides:

Mandatory. Gasoline shall not be stored underground, but may be used only to power internal combustion engines in nongassy mines that have multiple horizontal or inclined roadways from the surface large enough to accomodate vehicular traffic. ... All roadways and other openings shall be connected with another opening every 100 feet by a passage large enough to accommodate any vehicle in the mine.

4/ The notice read:

NOTICE THIS IS PRIVATE PROPERTY. No person without the specific written authorization from the owner and operator will be permitted on this property. Violators will be considered trespassers and the owner and operator will not be responsible for their safety.... Dated: May 25, 1979.

The notice was signed by Calvin Black.

After leaving the Blue Lizard Mine, the inspectors went to Black's Markey Mine, where a similar confrontation occurred. As a result, Inspector Beason issued another citation alleging a violation of section 103(a) of the Act, and a subsequent section 104(b) withdrawal order. As at the Blue Lizard Mine, Black continued mining operations after issuance of the withdrawal order.

The Secretary subsequently proposed civil penalties for the citations and orders, Calvin Black contested the penalties, and a hearing was held before an administrative law judge of this independent Commission. The judge rejected Black's argument that it should not be held liable for the violations committed by the employees of the independent contractor, Sanders. In reviewing the Secretary of Labor's decision to cite the operator for the independent contractor's violation, the judge applied the relevant principles stated in Phillips Uranium Corp., 4 FMSHRC 549 (April 1982) and Old Ben Coal Co., 1 FMSHRC 1480 (October 1979), aff'd, No. 79-2367 (D.C. Cir. January 6, 1981). The judge found that the activities that led to the issuance of the citations involved workers untrained in mine safety and extended over a period of one year. 5 FMSHRC at 1442. He determined that the violations endangered not only Sanders' employees, but also Black's employees. He held that Black had a duty "to monitor and control the independent contractor's workers and their activities as they affected general mine safety considerations." Id. The judge therefore found that Black had been properly cited. Noting that Black had not specifically denied the violations, the judge concluded that violations of sections 57.15-30 and 57.4-52 had occurred, and assessed civil penalties.

In deciding whether the operator had unlawfully denied the MSHA inspectors entry into its mines, the judge relied on the language of section 103(a) of the Mine Act which, he noted, requires that no advance notice of an inspection be given. 5 FMSHRC at 1444. The judge found that the inspectors had identified themselves and informed the operator's representatives of the purpose of their visits, and that the inspectors were not required to "force entry" in order to inspect. Id. In addition he found that, although the inspectors were not expressly prohibited from entering the mines, mine personnel--acting on instructions from the mine owner, Mr. Calvin Black-- "effectively prevented access to the mines by demanding that notice and permission precede entry." Id. In reaching these conclusions the judge credited the inspectors' testimony over that of Mr. Black and the superintendent of the Markey Mine. 5 FMSHRC at 1443-44, 1446-47. The judge concluded that the operator's actions violated section 103(a) of the Act, affirmed the citations, and assessed civil penalties of \$200 for each violation.

On review, Black does not contest the judge's conclusion that sections 57.15-30 and 57.4-52 were violated, but rather argues that it should not be held liable for these violations occurring in connection with the acts of its independent contractor. Black also contends that substantial evidence does not support the judge's conclusion that it violated section 103(a) of the Mine Act. We disagree.

The Commission initially considered in Old Ben, supra, the question of an owner-operator's liability for violations of the Mine Act arising from the work activities of its independent contractors. There the Commission decided that an owner-operator can be held responsible without fault for a violation committed by its contractor, but also stressed that direct enforcement against contractors is vital to the Mine Act's enforcement scheme. 1 FMSHRC at 1481-83, 1486. We held further that the Secretary's decision to proceed against the operator rather than its contractor is subject to Commission review. 1 FMSHRC at 1481-84. The basic test applied by the Commission in reviewing the Secretary's decision to proceed against an operator is whether the choice "was made for reasons consistent with the purpose and policies of the [Mine] Act." 1 FMSHRC at 1485. 5/ In Phillips Uranium, supra, the Commission reaffirmed the principles enunciated in Old Ben and indicated that in choosing the entity against whom to proceed, the Secretary should look to such factors as the size and mining experience of the independent contractor, the nature of the task performed by the contractor, which parties contributed to the violation, and the party in the best position to eliminate the hazard and prevent it from recurring. 4 FMSHRC at 552-53. We made clear in Phillips that we could not approve a Secretarial decision grounded solely on considerations of "administrative convenience" rather than the protective purposes of the Act. 4 FMSHRC at 553. 6/

Applying these principles to the present case, we affirm the judge's conclusion that Black was properly cited for the violations at issue arising from the work of Sanders' employees. The evidence surrounding the violation of section 57.15-30, the self-rescuer standard, supports the judge's conclusions that Black contributed to the violation and was

5/ The Commission rejected the Secretary's position that Commission review should be limited to the question of whether the Secretary abused his discretion in proceeding against the operator. 1 FMSHRC at 1485. In the present case, the Secretary has again argued that the proper standard of review is abuse of discretion. For the reasons stated in Old Ben, we adhere to the standard articulated in that decision and followed by us since. See Phillips, supra, 4 FMSHRC at 551.

6/ In both Phillips (4 FMSHRC at 552) and our subsequent decision in Cathedral Bluffs Shale Oil Co., 6 FMSHRC 1871, 1872 (August 1984), petition for review filed, No. 84-1492 (D.C. October 1, 1984), we noted the Secretary's adoption in July 1980 of independent contractor identification regulations (30 C.F.R. Part 45) and accompanying enforcement guidelines governing the issuance of citations to independent contractors. The guidelines (44 Fed. Reg. 44497 (July 1980), quoted in Cathedral Bluffs, supra, 6 FMSHRC at 1873) are generally consistent with Commission case law in this area. However, they were adopted after the citations in the instant case were issued and the Secretary did not rely upon them before the judge.

in the best position to eliminate the hazard and prevent it from recurring. Sanders had only three employees at Black's mine, and they were in the mine intermittently performing a relatively small-scale surveying task. The record reflects that Sanders' employees were unfamiliar with self-rescue devices and their use, suggesting that Sanders--or at least the crew in question--was inexperienced in the fundamental requirements of mine safety. On the other hand, Black had continuing responsibility for compliance with the Mine Act at its mines. Because of the limited nature of the work performed by Sanders' employees in the mine, Black was in a position to insure that the self-rescue devices were issued to and used correctly by Sanders' employees. In sum, we find that the judge properly determined that the Secretary's citation of Black was consistent with the purposes and policies of the Mine Act.


We also affirm the judge's conclusion that Black was properly cited for the violation of section 57.4-52, involving the use of gasoline-powered vehicles in a mine without multiple roadways and sufficient crosscuts. The standard is contained in a section of the regulations entitled "Fire Prevention and Control." In issuing the citation, the inspector was concerned that because of the lack of crosscuts, the parked jeep could obstruct all miners in escaping from a fire or air contamination, including air contamination contributed to by the jeep's gasoline exhaust. 5 FMSHRC at 1441. Moreover, there is no question but that fire prevention is a fundamental continuing responsibility of the production-operator. The operator must always have control over mine premises to maintain a comprehensive fire prevention program in compliance with applicable regulations. Accordingly, we affirm the judge's conclusion that Black was the properly cited party.


Concerning the alleged violation of section 103(a) of the Mine Act, Black argues that its employees were not instructed to deny inspectors access to its mines. Black also contends that the employees at both mines told the inspectors that they were permitted to inspect, and that it was the inspectors who declined to inspect the mines. We reject these arguments.


The law on denial of entry under the mandatory inspection provisions of section 103(a) of the Act is clear. Section 103(a) expressly requires that no advance notice be given an operator prior to an inspection and gives authorized representatives of the Secretary an explicit right of entry to all mines for the purpose of performing inspections authorized by the Act. The Supreme Court has upheld the constitutionality of these provisions. Donovan v. Dewey, 452 U.S. 594, 598-608 (1981). Consistent with that decision, we have held that an operator's failure to permit such inspections constitutes a violation of section 103(a). Waukesha Lime & Stone Co., Inc., 3 FMSHRC 1702, 1703-04 (July 1981); United States Steel Corp., 6 FMSHRC 1423, 1430-31 (June 1984).

Substantial evidence supports the judge's finding that Black's actions amounted to a denial of entry. Upon arrival at the mines, the inspectors properly identified themselves and informed management personnel of the purpose of their presence and of the inspection requirements of the Act. The judge credited the inspectors' testimony that the mine personnel, stating that they were acting upon instructions from Black's owner, informed the inspectors that they were trespassing and needed to obtain Black's written permission before inspecting. The judge's credibility resolutions, on which he based his findings, are reasonable and are supported by the evidence. We agree with the judge that management personnel thus effectively prevented access to the mines whether or not they also physically prevented the inspectors from conducting their inspections. MSHA inspectors are not required to force entry or to subject themselves to possible confrontation or physical harm in order to inspect. Thus, we affirm the judge's conclusion that Black violated section 103(a).

Accordingly, on the bases discussed above, the judge's decision is affirmed. 7/


Richard V. Backley, Acting Chairman


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

7/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves a panel of three members to exercise the powers of the Commission.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

August 30, 1985

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION, (MSHA)
on behalf of SHELBY
EPPERSON

v.

JOLENE, INC., aka JOLINE, INC.


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: Docket No. KENT 83-38-D
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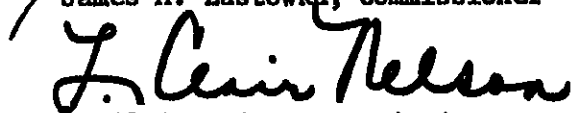
ORDER

Upon consideration of the motion of Joline, Inc., to reopen the record in this case and of the Secretary's response thereto, we deny the motion. Joline's motion directly follows the January 25, 1985 Order of the United States Court of Appeals for the Sixth Circuit, enforcing the Commission's order granting Shelby Eperson reinstatement, back pay, interest and expenses. Donovan v. Joline, Inc., No. 84-3358 (unpublished).

The Secretary's response to the motion states inter alia "The jurisdiction of the Commission at this point in the proceeding has ceased." Response at 4. We agree. Under Section 106(a)(1) of the Mine Act, the Sixth Circuit has exclusive jurisdiction over this matter. Accordingly, respondent's motion to reopen is denied.

For the foregoing reasons we also deny respondent's motion for time in which to reply to petitioner's response filed August 29, 1985.


Richard V. Backley, Acting Chairman


James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Distribution

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

AUG 5 1985

EMILIANO ROSA CRUZ,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. SE 83-62-DM
v.	:	
	:	
PUERTO RICAN CEMENT COMPANY,	:	
INC.,	:	
Respondent	:	

DECISION ON REMAND

Before: Judge Broderick

The Commission remanded this case to me by order issued April 12, 1985 for reconsideration and further findings on the alleged threat complainant made on the life of Respondent's assistant personnel manager. The matter was also remanded to give Respondent the opportunity to depose complainant concerning his attempts to obtain interim employment and the extent of his interim earnings. I interpret this direction to mean that I should make further findings on the relief to which Complainant is entitled, by bringing the relief order up to date.

On April 25, 1985, I ordered that deposition testimony be taken from complainant and from Respondent's assistant personnel manager regarding the alleged threat on the latter's life. I also directed that Complainant make himself available for deposition concerning his efforts to obtain interim employment and the extent of his interim earnings.

The depositions were taken on May 10, 1985. Complainant has filed an objection to certain documents submitted at the depositions. Complainant has also filed a statement of additional attorney's fees and legal expenses to which Respondent objects. Transcripts of the depositions were filed with me on July 2, 1985, by Respondent. Complainant has not filed any objections or corrections. Therefore, I accept the transcripts as part of the record in this case. On July 8, 1985, Respondent filed a memorandum discussing the post-remand deposition evidence. On July 8, 1985, complainant's attorney filed a motion to withdraw as counsel for complainant on the ground that he has been appointed Judge of the Superior Court of Puerto Rico. I called counsel on July 9 and was assured

that he would arrange for a substitute attorney who would file an appearance. No such appearance has been filed. However, Judge Alvarado's motion to withdraw as counsel for complainant is GRANTED. Because the case was remanded to me for expedited proceedings, and because no further evidentiary matters are involved, I believe that withholding my decision further is not justified.

I. THE POST DISCHARGE ALLEGED THREAT

The depositions of Pedro Rene Vargas (identified at the hearing as Rene Vargas) and Emiliano Rosa taken pursuant to my order and as a consequence of the Commission remand have substantially added to the record on the alleged threats made by Complainant on Vargas' life. The only evidence of such threats in the transcript of the original hearing was the testimony of Vargas that Complainant threatened Vargas in the unemployment office: "He said that he had not been able to get this benefit because of a declaration that I did and he was going to take action over me . . . He said that he was going to kill me." (Tr. 63)

In his deposition, Vargas elaborated on this testimony. He stated that at the Puerto Rico Department of Labor Building on September 21, 1983, complainant told Vargas "with the statements you gave I am not going to get my benefits." (D.7) Vargas and Complainant were alone at the time, and were about 10 feet apart. Complainant told Vargas "I am armed and I'm going to kill you." (D. 25) Vargas told Mr. Rosich of the Labor Relations Department of the threat and was told to call a judge. He called Judge Febus Bernardini, a Superior Court Judge or District Judge in Ponce. He also told Mr. Marcucci, the Union President. A few days later Vargas met with the Judge who told him that he had already talked to complainant and that Vargas should call the Judge "if anything happens." (D. 20)

Complainant testified that he saw the Judge the day following his unemployment hearing concerning the alleged threat to Vargas. He also testified that he had a permit to carry a weapon in September 1983, and that everyone in the company knew that he carried a weapon. Complainant denied that he threatened to kill Vargas. He admitted that he told Vargas that he was going to take action against him, but stated that he was referring to "judicial action." (D. 109)

On the basis of the evidence taken subsequent to the Commission remand, I find that Complainant did in fact threaten Vargas' life. The threat was taken seriously and was not an off-hand or jocular remark. I am accepting the

testimony of Vargas over that of Complainant on this issue because (1) the record does not disclose any motive for Vargas to fabricate the testimony; (2) he immediately reported the threat to local authority; (3) he told others, including the President of the local union who testified at the hearing and was present at the depositions. Respondent has objected to the taking of Vargas' deposition and to that part of the deposition of Complainant which dealt with the alleged threat to Vargas. I am overruling the objections. I should note that without the above testimony, the record would not support a finding that complainant made a serious threat to kill Vargas. Vargas' testimony at the original hearing (Tr. 63) that complainant "said he was going to kill me" in my judgment is not sufficient for me to make a finding that Complainant committed an act constituting a serious criminal offense. However, the additional evidence in the depositions: that Rosa carried a weapon; that Vargas made an official complaint to a local judge who called Rosa to court; that Vargas notified others including the union president of the threat -- persuades me that Rosa made a serious threat on Vargas' life.

II. INTERIM EMPLOYMENT AND EARNINGS

In my order issued March 7, 1985, I noted that complainant had supplied a copy of his 1983 income tax return (He was discharged effective April 25, 1983). He also authorized the Social Security Administration to give Respondent a copy of his earning record for the year 1983.

In the course of Mr. Vargas' deposition, Respondent submitted certain documents showing the employment in industries promoted by the Economic Development Administration for the Ponce municipality in 1983 and 1984; a statement from the Commonwealth Department of Labor and Human Resources to the effect that 3200 persons were employed (hired ? "se han colocaco alrededor") in Ponce from April 1983 to March 4, 1985. Also submitted was the decision of the Commonwealth Employment Security Referee denying unemployment benefits to complainant on the ground that he was discharged for chronic absenteeism. In his deposition, Vargas admitted that unemployment in Ponce was high.

At his deposition, complainant testified that he had sought work between April and September, 1983. He named various employers to whom he applied for work. He stated that all his applications for employment were oral; he had not made any written applications. Complainant's testimony as to whether he registered at the Department of Labor as seeking employment is confusing. On the basis of his testimony, I am not able to determine whether he did or not. The Social

Security records for 1983 and 1984 have been requested but as of the time of the deposition had not been received. The record as augmented does not change my finding (order of March 7, 1985), that complainant had no interim earnings other than those testified to at the hearing (he worked from January 1, 1984 to February 18, 1984 and earned \$3.35 per hour). On the basis of the augmented record, I find also that complainant made reasonable efforts to secure interim employment during the relevant period.

III. ADDITIONAL ATTORNEY'S FEES

On June 17, 1985, Counsel for complainant submitted a statement claiming additional attorney's fees and legal expenses. He showed a total of 30.75 hours expended from September 20, 1984 to June 7, 1985 at \$60.00 per hour and requests approval of \$1845.00 in addition to the \$2,340.00 previously approved. Respondent objects to the claim on the grounds (1) that it is not sufficiently descriptive of the services performed and (2) the services performed referred to the Respondent's Petition for Review and the back pay computation, "issues on which Respondent has prevailed."

Section 105(c)(3) of the Act provides that "whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) . . . reasonably incurred . . . for or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation."

I find that the legal services of attorney Alvarado in connection with the Petition for Review and the proceedings on remand were reasonably incurred in connection with the prosecution of this proceeding. The statement is not as detailed as it might be, but the number of hours and the description of the services appear reasonable.

ORDER

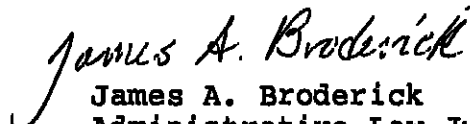
I have reviewed the entire record including the evidence submitted pursuant to the Commission remand, and have considered the contentions of the parties. Based on that record and in the light of the Commission remand, my decision issued July 19, 1984, and order issued March 7, 1985 are modified as follows:

(1) Reinstatement of complainant as ordered on July 19, 1984 is "inappropriate" because of the threat complainant made on the life of Vargas. NLRB v. R. C. Can Company, 340 F.2d

433 (5th Cir. 1965). Therefore, the order to reinstate complainant to the position from which he was discharged is RESCINDED. Respondent is not ordered to reinstate him.

(2) Respondent's liability for back wages is suspended as of September 21, 1983, the date of the threat above referred to. See *Alumbaugh Coal Corp. v. NLRB*, 635 F.2d 1380 (8th Cir. 1980): "thus, . . . (the employee discharged for union activity) should be granted reinstatement with full backpay for only that period preceding his unlawful post discharge conduct." Therefore, my order of March 7, 1985 is AMENDED to require Respondent to pay back wages only from April 25, 1983 to September 21, 1983 with interest thereon at the rate of 16 percent for the back wages payable from April 25, 1982 to June 30, 1983 and at the rate of 11 percent for the back wages payable from July 1, 1983 to September 21, 1983.

(3) Respondent IS ORDERED to pay to Complainant's attorney the further amount of \$1845.00 for legal services from September 20, 1984 to June 7, 1985, making a total amount for legal fees and expenses of \$4185.00.


James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

AUG 6 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 85-12
Petitioner	:	A.C. No. 44-05210-03512
	:	
v.	:	No. 44 Mine
	:	
LAMBERT COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Mary K. Spencer, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Mr. Dennis Sutherland, Office Manager, Lambert Coal Company, Nora, Virginia, for Respondent.

Before: Judge Maurer

Statement of the Case

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. section 801, et seq., the "Act", in which the Secretary charges the Lambert Coal Company with one violation of the mandatory standard at 30 C.F.R. § 75.200. The general issues before me are whether the company has violated the regulatory standard as alleged in the petition and, if so, the appropriate civil penalty to be assessed for the violation.

The hearing was held as scheduled on June 13, 1985 at Big Stone Gap, Virginia. Documentary exhibits and oral testimony were received from both parties.

The Mandatory Standard

Section 75.200 of the mandatory standards, 30 C.F.R. § 75.200 provides as follows:

§ 75.200 Roof control programs and plans.

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970.

The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

The Cited Condition or Practice

Citation No. 2153689 as modified cites a violation of 30 C.F.R. § 75.200 for the following condition:

The approved roof control plan was not being complied with near the face of the No. 3 entry of the 002 active working section in that an area of roof measuring 9 feet in length and up to 3 feet in width and was cracked all the way around it (oval shaped) was present and additional supports such as crossbars were not installed to supplement the resin roof bolts that had been used. The plan stipulates that when abnormal conditions exist that additional roof support will be installed.

Stipulations

At the hearing, the parties agreed to the following stipulations which were accepted (Tr. 5):

1. Lambert Coal Company is the owner and operator of the No. 44 mine.

2. The operator and the No. 44 mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The presiding administrative law judge has jurisdiction over this proceeding.

4. The Lambert Coal Company's size is 379,766 production tons per year and the No. 44 mine's size is 103,877 production tons per year.

Discussion and Analysis

The inspector who issued the subject citation testified that he inspected the Lambert Coal Company's No. 44 mine on November 6, 1984. As he entered the Number 3 entry in the 002 working section of the mine he observed an oval-shaped crack in the mine roof approximately nine (9) feet in length and up to three (3) feet in width. He also testified that there was a mud seam present in the crack and according to the inspector this would indicate that there is a separation in the roof that most likely goes all the way to the surface and the roof is also more likely to fall out. The entry at that point was approximately sixty (60) feet from the surface. Based upon what he saw, the inspector believed that there was a reasonable likelihood of a nine (9) foot by three (3) foot rock of unknown thickness, and therefore unknown weight, falling out of the roof, which could result in a death or injury.

The operator's roof bolter who had bolted this area testified that he drilled through the rock in three places to install roof bolts and it was eighteen (18) inches thick. He stated he was able to tell that because the pinner head will jump when it hits the crack and he was using a two (2) foot starter barrel that was not all the way in when it jumped.

The citation alleges a violation of 30 C.F.R. § 75.200 contending that the operator failed to comply with its approved roof control plan. More particularly, the inspector testified that the specific portion of the plan that was not complied with is contained in the second sentence of the first paragraph on page 5 (Tr. 13, Government Exhibit No. 4). That sentence reads: "In areas where subnormal roof conditions are encountered, indicated, or anticipated, the operator shall provide additional support where necessary."

There is no dispute that a subnormal roof condition was present because of the 9x3 foot oval-shaped crack in the mine roof. There is a substantial dispute, however, both as to what corrective action, if any, was taken prior to the citation being issued and what quantum of additional support was necessary in the first instance.

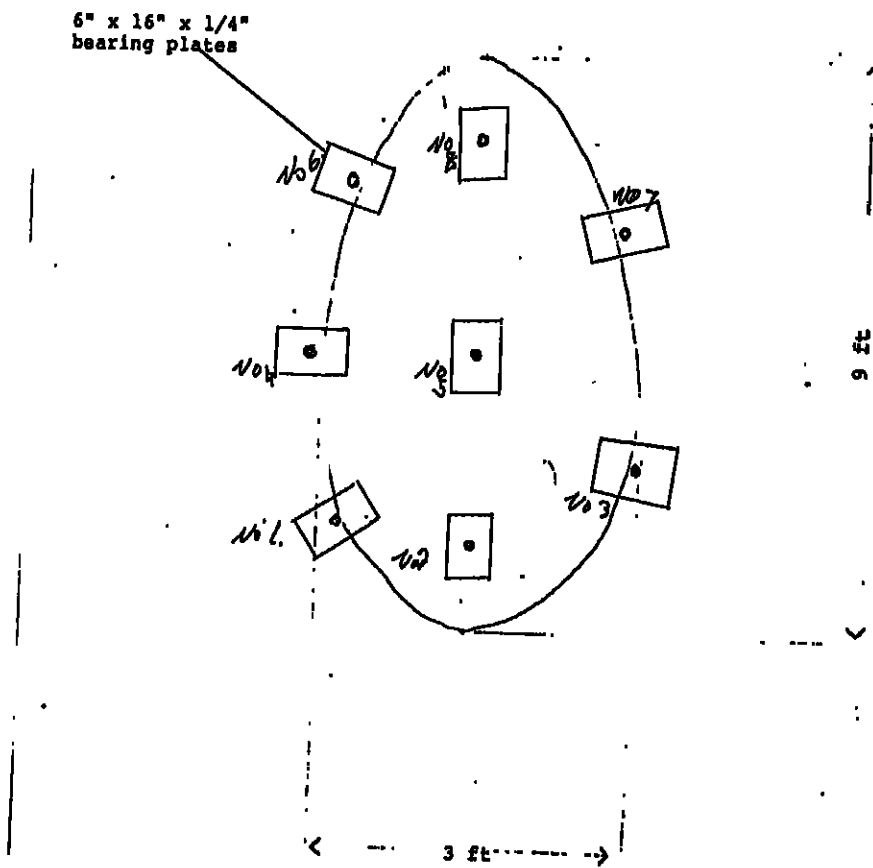
A substantial question of fact exists as to what additional support, if any, the operator provided to meet the subnormal roof condition he encountered. The answer to this question turns on the credibility of the two witnesses.

The inspector testified on direct and cross-examination that they had complied with their normal roof control plan in the area of the crack, meaning they had installed resin roof bolts on four (4) foot centers in that entry. However, a diagram of the No. 3 entry made by the inspector in his field notes, and admitted into evidence as Government Exhibit No. 5, indicates that two (2) bolts that would have fallen within the oval-shaped crack were not installed. Another diagram, later admitted into evidence as Respondent's Exhibit No. 1 and purporting to show eight (8) additional roof bolts and bearing plates inside and around the outside circumference of the crack was shown to the inspector on cross-examination. He stated that to the best of his recollection the area was not bolted in this manner, but rather as it is depicted in his field notes. On his re-direct examination, however, he didn't seem too sure. The following exchange took place at Tr. 35:

Q. Mr. Phillips, I'd just like to bring you back to what you observed as far as the roof bolting pattern was in that entry on that roof on that day. You said that the normal roof bolting pattern had been observed, did you observe any type of additional support when you made your inspection?

A. They may have been installing some extra roof bolts.

In contrast to the rather uncertain recollection of the MSHA inspector, Mr. Counts, the operator's roof bolter, who actually did the work in this entry testified with absolute certainty that the roof was bolted as depicted in Respondent's Exhibit No. 1, which is reproduced below:



Respondent's Exhibit No. 1

Mr. Counts testified that he drilled the roof and installed five (5) foot resin roof bolts and 6"x16"x1/4" bearing plates in the order shown above. Further, he is absolutely sure this is the way it was before the inspector saw it on the morning of November 6, 1984.

I accept the operator's description of the roof at that time and find that it was substantially as depicted in Respondent's Exhibit No. 1 which indicates that the normal roof bolting pattern had been supplemented with additional bolts and oversized bearing plates.

the existence of the additional support as dependent, the second issue presented is that it was adequate. I conclude that it was.

... argument is that even if the roof was bolted as depicted in Respondent's Exhibit No. 1, it was insufficient because given the proximity of the mud seam and the nature of the crack, crossbars were necessary to provide

adequate support of this particular area. It should be noted that the approved roof control plan for this mine does not specifically require crossbars to support abnormal or subnormal roof, but rather contains a general requirement that "the operator shall provide additional support where necessary." In this particular case, it was and is the considered expert opinion of the inspector that horizontal support in the nature of crossbeams or crossbars was required. However, in arriving at this conclusion, the inspector did not know how far up into the roof the crack went. Therefore, he did not know how thick the rock was or whether the supplemental roof bolts were anchored in solid roof.

The testimony of the operator's witness, who actually did the roof bolting, and whom I find to be credible, is crucial on this point. Mr. Counts testified that he drilled three (3) holes up through the middle of the rock and found it to be more or less uniformly eighteen (18) inches thick from one end to the other. He further stated that he drilled six (6) foot test holes, a foot above the bolts, and installed the eight (8) resin roof bolts in the order shown in Respondent's Exhibit No. 1 into solid roof. Additionally, Mr. Counts offered the opinion that based on eight years of roof bolting experience and the fact that he is the "first one under there," he felt the supplemental roof bolts and bearing plates were adequate to make it a safe working place.

I find the operator's arguments and evidence regarding the condition and adequacy of the supplemental roof support persuasive and I accept it. Based upon this evidence I conclude the additional bolting was sufficient to support the roof.

ORDER

Citation No. 2153689, as modified, is hereby vacated and this case is dismissed.


Roy J. Maurer
Administrative Law Judge

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**Mr. Dennis B. Sutherland, Office Manager, Lambert Coal
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/db

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

AUG 6 1985

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 85-46-D
ON BEHALF OF	:	
ALAN GAUTHIER,	:	Black Thunder Mine
Complainant	:	
	:	
v.	:	
	:	
OSBORNE BROTHERS CONSTRUCTION	:	
INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT AND ORDER

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Complainant;
George E. Powers, Jr., Esq., Godfrey & Sundahl,
Cheyenne, Wyoming.

Before: Judge Lasher

This case arose upon the filing of a complaint by the Secretary in which review of Respondent's allegedly discriminatory discharge of its employee, Alan Gauthier, was requested.

Evaluation of the settlement stipulation submitted by the parties reveals that it proposes an adequate remedy for the alleged infraction as reflected in the agreed-on order which follows. The Secretary as part of the agreement has waived any penalties sought in relation to the controversy in question and the alleged discriminatee, Alan Gauthier, has specifically agreed to the settlement. Accordingly, subject to full execution of the order which follows, the stipulated settlement is approved and this matter is dismissed.

ORDER

(1) Respondent, within 10 days from the date hereof, shall pay Alan Gauthier the sum of \$8,500.00.

(2) In the event that Respondent returns to the Black Thunder job site within 1-year from the date hereof, it will offer Alan Gauthier reinstatement to the job of heavy equipment operator (the job he held prior to his discharge) at a comparable rate of pay, with the same duties, and without loss of seniority and other benefits. As part of the agreement, Complainant acknowledges that Respondent currently has no plan to return to the Black Thunder site; Respondent has extended no guarantee that it will return to such site.

(3) Respondent shall immediately expunge from Alan Gauthier's employment records any adverse references to his discharge.

Michael A. Lasher Jr.
Michael A. Lasher, Jr.
Administrative Law Judge

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(Certified Mail)

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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FALLS CHURCH, VIRGINIA 22041

AUG 6 1985

HOBET MINING AND CONSTRUCTION:
COMPANY,

Contestant :

v. :

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Respondent :

CONTEST PROCEEDINGS

Docket No. WEVA 84-375-R
Citation No. 2146497; 8/7/84

Docket No. WEVA 84-376-R
Citation No. 2146498; 8/7/84

Docket No. WEVA 84-377-R
Citation No. 2146499; 8/7/84

Docket No. WEVA 84-378-R
Citation No. 2146500; 8/7/84

Pine Creek No. 12 Prep Plant

Docket No. WEVA 84-379-R
Citation No. 2146461; 8/1/84

Docket No. WEVA 84-380-R
Citation No. 2146462; 8/1/84

Docket No. WEVA 84-381-R
Citation No. 2146464; 8/1/84

Docket No. WEVA 84-382-R
Citation No. 2146470; 8/2/84

Docket No. WEVA 84-383-R
Citation No. 2146471; 8/2/84

Docket No. WEVA 84-384-R
Citation No. 2146472; 8/2/84

Docket No. WEVA 84-385-R
Citation No. 2146473; 8/2/84

Docket No. WEVA 84-386-R
Citation No. 2146475; 8/2/84

Docket No. WEVA 84-387-R
Citation No. 2146477; 8/2/84

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

HOBET MINING AND CONSTRUCTION COMPANY,
Respondent

: Docket No. WEVA 84-388-R
: Citation No. 2146480; 8/2/84
:
: Docket No. WEVA 84-389-R
: Citation No. 2146485; 8/3/84
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: Docket No. WEVA 84-390-R
: Citation No. 2146489; 8/3/84
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: Docket No. WEVA 84-391-R
: Citation No. 2146490; 8/3/84
:
: Docket No. WEVA 84-392-R
: Citation No. 2146495; 8/6/84
:
: Docket No. WEVA 84-393-R
: Citation No. 2434601; 8/7/84
:
: No. 7 Surface Mine
:
: CIVIL PENALTY PROCEEDINGS
:
: Docket No. WEVA 84-410
: A.C. No. 46-02249-03510
:
: Docket No. WEVA 84-411
: A.C. No. 46-02249-03511
:
: No. 7 Surface Mine
:
: Docket No. WEVA 85-4
: A.C. No. 46-06197-03509
:
: Docket No. WEVA 85-9
: A.C. No. 46-06197-03510
:
: Pine Creek No. 12 Prep.
: Plant
:
: Docket No. WEVA 85-10
: A.C. No. 46-02249-03512
:
: No. 7 Surface Mine

DECISION

Appearances: Sheila K. Cronan, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for the Secretary of Labor; Allen R. Prunty,
sq., Jackson, Kelly, Holt & O'Farrell,

Charleston, West Virginia, for Hobet Mining
and Construction Company.

Before: Judge Broderick

STATEMENT OF THE CASE

Contestant Hobet Mining and Construction Company (Hobet) has filed notices of contest challenging the issuance of 19 separate citations in August, 1984 at its Pine Tree No. 12 Preparation Plant and its No. 7 Surface Mine. The Secretary of Labor (Secretary) has filed Petitions seeking penalties for the violations alleged in each of the challenged citations. The proceedings were consolidated for the purposes of hearing and decision.

Pursuant to notice, the cases were heard in Charleston, West Virginia on April 16 and 17, 1985. Burel Skeens, David Mulkey and John G. Cheetham testified on behalf of the Secretary; Ira Robert Ehrlich, Dale Lucha and Delbert Ray Lawson testified on behalf of Hobet. Twenty one stipulations were read into the record at the commencement of the hearing. Both parties have filed post hearing briefs. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Because of the large number of alleged violations involved, and because many of them are factually similar, I will discuss them under descriptive headings.

I. FINDINGS AND CONCLUSIONS COMMON TO ALL VIOLATIONS.

Hobet Mining and Construction Company is the owner and operator of the No. 7 Surface Mine and the Pine Creek No. 12 Preparation Plant both located in Logan County, West Virginia. Hobet is subject to the Federal Mine Safety and Health Act of 1977 (the Act). I have jurisdiction over the parties and subject matter of these proceedings. Payment of civil penalties in these cases will not affect Hobet's ability to continue in business. Hobet produces 1,959,233 tons of coal annually, of which 339,952 tons are produced at the No. 7 surface mine. Hobet's history of prior violations shows that it had 43 paid violations at the Pine Creek No. 12 Preparation Plant during the period August 2, 1982 to August 6, 1984. From August 1, 1982 to July 31, 1984, there were 40 paid violations at the No. 7 Surface Mine. In both facilities combined, these violations included one of 30 C.F.R. § 77.206 (ladder violations) and 17 of 30 C.F.R. § 77.404 (machinery shall be

maintained in safe operating condition). This history is not such that penalties otherwise appropriate should be increased because of it.

II. LADDER VIOLATIONS

Citations 2146461 and 2146471 (Docket No. WEVA 84-410), Citation 2146489 (Docket No. WEVA 84-411), and Citation 21146499 (Docket No. 85-9) all involve defective climb ladders on equipment. The standard violated is 30 C.F.R. § 77.206(a) which requires that "ladders shall be of substantial construction and maintained in good condition." Hobet concedes that the violations occurred, but contests the Inspector's findings that they were significant and substantial. The citations respectively charged that (1) the first steel step and the rope step were missing on the right climb ladder of a front end loader; (2) the first wire step was missing on the left climb ladder of a rock truck; (3) the first and second steps were bent into the frame on the right climb ladder on a front end loader; (4) the entire right climb ladder was bent into the frame on a rock truck. Each of the vehicles in question has two climb ladders, one on the right and one on the left. The inspector was concerned even though only one ladder was defective in each case, because (1) the vehicles are often operated next to a high wall, making one ladder not usable; (2) the operator of the vehicle normally uses the left climb ladder and mechanics, greasers, etc. normally use the right climb ladder and would likely be unaware of the defects; (3) the equipment is used at night and in unlighted areas. The inspector was of the opinion that the defective ladders created a slip and fall hazard which could result in a serious injury. Hobet's Safety Specialist stated that there were four means of access to end loaders: two ladders, and climbing over the rear wheels. It is common for employees to mount the vehicles by climbing over the wheels. He also stated that the equipment operators checked the equipment, including ladders, and filed daily equipment check list reports before each shift.

I find that the defective ladders contributed to safety hazards, namely slipping and falling, which were reasonably likely to result in serious injury. The citations were therefore properly denominated as significant and substantial, and the violations were moderately serious. The defects were obvious to visual observation and Hobet should have been aware of them. Therefore, they resulted from Hobet's negligence. They were all promptly abated.

III. ROCK TRUCK LOW AIR PRESSURE SIGNAL VIOLATIONS

The Inspector testified that the air braking systems on the rock trucks are equipped with either an audible signal (buzzer), or a light which sound or come on when the air pressure is reduced below a safe level. Citations 2146464, 2146470 (Both in Docket No. WEVA 84-440), 2434601, (Docket No. WEVA 84-411), 2146497, 2146500 (both in Docket No. WEVA 85-4), and 2146472 (Docket No. WEVA 85-10), all charge that the low warning buzzer with which the truck was equipped was inoperative. Citation 2146490 (Docket No. WEVA 84-411) charges that the brake warning light with which the truck was equipped was inoperative. In none of these citations is it charged that the brakes themselves were defective. The trucks in question may carry up to 50 or 60 tons of rock, and run on grades of 10 percent or more. The inspector was of the opinion that failing to have an operative warning system when braking pressure was low could result in serious injury. The standard allegedly violated is 30 C.F.R. § 77.404(a) which provides that mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

Respondent does not dispute the inspector's findings that the vehicles in question did not have operative warning buzzers or lights. Clearly therefore the equipment was defective. Do these equipment defects affect safety? It is self evident that the warning systems which indicate low air pressure for the brakes were placed in the equipment as safety devices. They have no other apparent purpose. Respondent's expert witness, Dr. Ira Ehrlich, a mechanical engineer with substantial experience in heavy equipment braking systems, testified that when the air by which the service brakes are operated drops from its normal 120 psi to 60 psi, the buzzer is supposed to sound. However, as the air pressure drops, the rear emergency parking brake begins to actuate and becomes fully engaged at about 40 psi. This will stop the vehicle. If there is a sudden loss of air pressure, the buzzer will sound and the rear brakes will stop the vehicle at the same time. Dr. Ehrlich testified that the vehicles in question have automatic transmissions and have separate braking systems: the service brake which is an air brake and can be applied to the rear wheels only or to both front and rear at the option of the operator; a brake retarder system which applies to the rear wheels only and is oil cooled and is designed to be used on long downhill runs; an emergency parking brake which is automatically actuated when the oil or air pressure drops. The emergency brake can also be engaged intentionally by the vehicle operator. Hobet argues that the emergency brake system provides a fail-safe means for stopping the vehicle in the event of low air pressure even if the warning buzzer is inoperative.

The MSHA electrical inspector, John Cheetham, testified for the Secretary that a vehicle operator travelling downhill with his retarder on who had lost partial air pressure would be unable to react in a critical situation to stop suddenly with only partially effective service brakes. The buzzer would give him prior warning. In Cheetham's opinion the automatic emergency braking system would not take full effect if the air pressure was above 40 psi.

Although the inspector assumed that the brake warning light was intended to show that the air pressure was low, it appears from other testimony that it merely showed that the parking brake or emergency brake was engaged. It did not, nor was it intended to show that the brakes were in any way defective. A defective brake warning light does not establish that the vehicle is not maintained in safe operating condition. Therefore, the violation charged in citation 2146490 has not been established. The citation will be vacated and no penalty assessed.

However, I conclude that the low air warning devices (buzzers) on the mobile equipment services brakes are intended to warn the vehicle operator that he may have a problem, giving him time to avoid potential danger. The fact that the buzzer warning device is only one of a set of safety devices does not make it unimportant. The devices are related to the safe operation of the equipment. These devices must be operative if the mobile equipment is to be maintained in safe operating condition. Therefore, I conclude that Hobet violated the mandatory standards as charged in the citations involving inoperative buzzers. In Mathies Coal Co., 6 FMSHRC 1 (1984), the Commission held that a violation is significant and substantial if it contributes to a safety hazard, and there is a reasonable likelihood that the hazard will result in an injury of reasonable seriousness. The violations being considered here contribute to a safety hazard, and I accept the testimony of Inspector Cheetham that there is a reasonable likelihood that the hazard will cause serious injury. The violations are significant and substantial. The violations were moderately serious. There is no evidence that they resulted from Hobet's negligence. They were all promptly abated in good faith.

IV. TRUCK RETARDER LIGHT VIOLATIONS

The retarder braking system, as I explained above, is primarily designed to hold back the vehicle on long downhill runs. The rock trucks (subjects of citations 2146477, 2146498, and 2146473) are equipped with a light which comes on when the

retarder brake is engaged. The water truck (subject of citation 2146475) apparently was not equipped with such a light. According to Dr. Ehrlich the purpose of the retarder light is to remind the driver to turn the retarder off when he is no longer going down a grade. The light will not tell him whether the retarder is working but only that the control is on. If the retarder is not working, the truck could be stopped with the service brake. MSHA Inspector Mulkey testified that if the retarder is inadvertently left on while going uphill, the vehicle could stall and the driver lose control. Hobet's maintenance foreman testified that the retarder being engaged while going uphill could not cause the vehicle to stall, but would stop the vehicle. I accept Hobet's testimony on this issue and conclude that the retarder light is not a device that is related to safety. The absence of functioning retarder lights therefore does not indicate that the mobile equipment involved in these citations was not being maintained in safe operating condition. Therefore, the violations charged in citations 2146477, 2146498, 2146473 and 2146475 have not been established, the citations will be vacated and no penalties imposed.

V. UNSAFE DUMPING VIOLATIONS

Citation 2146480 charged a violation of 30 C.F.R. § 77.1608(c) because rock was being pushed over a highwall by a dozer and the roadway below "was not flagged against the falling material." The Inspector, Burel Skeens, stated that two large rocks were observed in the roadway. Citation 2146495 charged a violation of 30 C.F.R. § 77.1608(b) because a rock truck was dumping too close to the edge of a 20 foot bank. Dale Lucha, Hobet's Safety Specialist, accompanied the Inspector when the citations were written. He testified that he did not see the rocks in the roadway described by the Inspector (they rode in separate vehicles about 200 feet apart), and the rocks were not present 45 minutes to an hour later. When questioned by Lucha, the dozer operator denied that they had pushed rocks into the roadway. Lucha also disputed the inspector's testimony that the Inspector got out of his vehicle and examined the area where the trucks were dumping. The Inspector testified that he saw a foreman in the area; Lucha stated that he did not notice any foreman there. There is considerable conflict in the testimony concerning these citations. The Inspector's testimony is direct, detailed and positive. The contrary evidence is not sufficient to overcome it, and I find that the conditions described in the two citations did exist, and the violations charged occurred. Both of the violations were serious and were reasonably likely to result in injury. They were properly cited as significant and substantial. There is insufficient evidence that the violation

charged in citation 2146480 resulted from Hobet's negligence. However, the violation charged in citation 2146495 was known to the operator's agent (a foreman) or should have been known. Hobet was negligent.

The citation was issued under section 104(d)(1) and alleged that the violation was caused by Hobet's unwarrantable failure to comply with the standard. Unwarrantable failure was equated with negligence in the case of Zeigler Coal Co., 7 IBMA 280. The Commission in United States Steel Corporation, 6 FMSHRC 1423 (1984) held that unwarrantable failure can be shown by a "serious lack of reasonable care." (1437). I conclude that the foreman's knowledge of the violative practice is imputed to Hobet and shows a serious lack of reasonable care. The citation was properly issued under section 104(d)(1). Both unsafe dumping citations were promptly abated.

VI. MISCELLANEOUS VIOLATIONS

Citation 2146462 was issued charging a violation of 30 C.F.R. § 77.1710(i) because an end loader operator was not wearing a seat belt. The end loader was equipped with roll over protection. The standard requires seat belts to be worn in a vehicle where there is a danger of overturning and where roll over protection is provided. The Inspector was of the opinion that there was a danger of the vehicle in question overturning; the operator's witnesses stated that there was no such danger. On this issue, I accept the judgment of the Inspector, and conclude that a violation of the standard was established. The original citation was modified to remove the significant and substantial finding. The modification also indicates that the gravity and negligence were low. I accept those conclusions. The violation was promptly abated.

Citation 2146485 charges a violation of 30 C.F.R. § 77.400(a) because a drive coupling to an overlimit switch on the shovel was not guarded. The switch turns very slowly, and the Inspector was obviously reluctant to "write it up." Hobet's maintenance foreman testified that there were no pinch points, and there was no possibility of a worker or loose clothing being caught. I find that the device did not constitute exposed moving machine parts which might be contacted by persons and cause injury. A violation was not established.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. The following citations are AFFIRMED as issued:

- a) 2146461
- b) 2146471
- c) 2146489
- d) 2146499
- e) 2146464
- f) 2146470
- g) 2434601
- h) 2146497
- i) 2146500
- j) 2146472
- k) 2146480
- l) 2146495
- m) 2146462 (as modified; not S&S)

2. The following citations are VACATED:

- a) 2146490
- b) 2146477
- c) 2146498
- d) 2146473
- e) 2146475
- f) 2146485

3. Considering the criteria in section 110(i) of the Act, I conclude that the following civil penalties are appropriate for the violations found herein.

CITATION	30 CFR STANDARD	<u>PENALTY</u>
2146461	77.206(a)	\$ 100.00
2146471	77.206	100.00
2146489	77.206	100.00
2146499	77.206	100.00
2146464	77.404(a)	100.00
2146470	77.404(a)	100.00
2434601	77.404(a)	100.00
2146497	77.404(a)	100.00
2146500	77.404(a)	100.00
2146477	77.404(a)	100.00
2146480	77.1608(c)	150.00
2146495	77.1608(b)	200.00
2146462	77.1710(i)	30.00
	TOTAL	\$1380.00

Hobet is ORDERED TO PAY the sum of \$1380.00 within 30 day of the date of this decision.

James A Broderick
James A. Broderick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

AUG 8 1985

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No: LAKE 84-98
Petitioner : A.O. No: 33-00968-03568
: Nelms No. 2 Mine
v. :
:
YOUGHIOGHENY & OHIO COAL CO., :
Respondent :

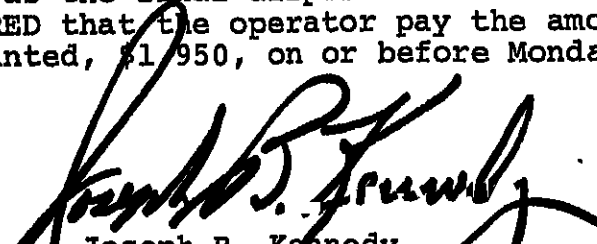
DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor,
U.S. Department of Labor, Cleveland, Ohio,
for Petitioner;
Robert C. Kota, Esq., St. Clairsville, Ohio,
for Respondent

Before: Judge Kennedy

This matter came on for an evidentiary hearing in Wheeling, West Virginia on May 30 and 31, 1985. At the conclusion of the evidence the trial judge entered a tentative bench decision (Tr. 408-409) finding the two violations charged did, in fact, occur and that the penalties warranted were \$1,000 for Citation 2203748 and its companion closure order and \$950 for Citation 2327363.

Upon receipt of the transcript, the trial judge issued an order to show cause why the tentative decision should not be confirmed as the final disposition of this matter. The operator having failed to show such cause, it is ORDERED that the tentative decision of May 31, 1985 be, and hereby is, ADOPTED and CONFIRMED as the final disposition of this case. It is FURTHER ORDERED that the operator pay the amount of the penalty found warranted, \$1,950, on or before Monday, August 26, 1985.


Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

AUG 9 1985

HELVETIA COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. PENN 85-1-R
	:	Order No. 2256778; 8/28/84
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Lucerne No. 8 Mine
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 85-106
Petitioner	:	A.C. No. 36-04597-03533
v.	:	
	:	Lucerne No. 8 Mine
HELVETIA COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: William Darr, Esq., Rochester and Pittsburgh Coal Company, Indiana, Pennsylvania, for Helvetia Coal Company;
John S. Chinian, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor.

Before: Judge Melick

These consolidated cases are before me pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., "the Act" to contest a withdrawal order issued to the Helvetia Coal Company (Helvetia) under section 104(d)(1) of the Act and for review of civil

penalties proposed by the Secretary of Labor for the violation charged therein.¹

The withdrawal order at issue (Number 2256778) reads as follows:

Proper pre-shift examinations were not made in the high spot (roof fall) area in the North Mains belt-track entry located approximately 1000 ft. outby the 4 South track switch. Examinations were made, however, roof rails close together were installed restricting the person from making the examination in the high spot. A hose was provided from the roof rails to the roof of the high spot, however, supervisory personnel making the examination were using a CSE methameter Model 107 Approval No. 8C-37 with no adapters to use the provided hose to make the examination in the high cavity area.

Helvetia does not dispute that it was required to conduct methane tests in the cited caved area in accordance with the mandatory standard at 30 C.F.R. § 75.303 but maintains

¹Section 104(d)(1) reads as follows: "If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

that it was in fact properly conducting such tests at all times. The Secretary is concerned however that the tests as performed by Helvetia were not adequate to detect the presence of methane in the cited cavity and were therefore in violation of the standard.

The evidence shows that the cavity or high spot had existed for some time and extended to a maximum of 10 feet above the 6 foot high travelway. It was supported by I-beam rails and cribbing. Inspector Michael Bondra of the Federal Mine Safety and Health Administration (MSHA), a ventilation specialist, observed during the course of his inspection on October 28, 1984, that a hose or tube extended from the high spot of the cavity to the travelway. The tube had formerly been used in conjunction with a pump type methane monitor to test for methane in the high spot but had not been used for several years after Helvetia converted to the "CSE 102" methane monitor without a pump.

Inspector Bondra climbed into the high area of the cavity and performed smoke tube tests at various locations in the cavity area. According to Bondra the air did not clear out of the top 3 or 4 feet of the cavity. Since the mine operator was performing methane tests with the CSE 102 detector from the travelway at the inby side of the cavity Bondra concluded that the testing method was not adequate to detect the presence of methane in the high spot where there was no air movement. According to Bondra the test was not sufficient because the lighter-than-air methane would collect at the high point of the cavity and not be removed by ventilation. If the methane was not being ventilated it would not be detected with the hand-held methane monitor at the inby side of the cavity.

Both Richard Flack, the Senior Safety Inspector for Helvetia, and Robert Smith, Superintendent and Mine Foreman at the Lucerne No. 8 Mine, testified that before changing over to the CSE 102 methane monitor they personally made numerous smoke tube tests in all areas of the cited cavity and found in all cases that all points of the cavity including the high spots were being ventilated. Accordingly they determined that if methane were present in those high spots it would be detected by use of the hand-held methane monitor at the inby end of the cavity where the air flow exited the cavity. Indeed it was their conclusion that because of the problems they had had with the use of the extended tube (becoming broken and clogged with condensation

and rock dust) this method of detection was a significant improvement.

The Secretary nevertheless maintains based on the expert testimony of mining engineer and ventilation specialist Joseph Hadden that the operator should have known that the smoke tube test is valid only for one point in time and that various changes in mine conditions can alter ventilation patterns. According to Hadden the tests for methane must be taken between 12 inches to 18 inches from the top of the spot because methane is lighter-than-air and would be expected to accumulate near that location. Hadden pointed out that the cribs and cross-bars supporting the caved air would tend to obstruct air flow into the cavity and that methane accumulations could be pulled from the cavity into the active workings by the vacuum created by vehicles passing below.

I find the expert testimony of the MSHA witnesses to be most persuasive. Within this framework I conclude that the method of methane testing cited in this case was indeed deficient and a violation of the cited standard. I do not, however, find that the violation was the result of "unwarrantable failure". A violation is "unwarrantable" if the operator fails to abate a condition that he knew or should have known existed, or failed to abate because of indifference or lack of due diligence or reasonable care. Section 104(d)(1), Ziegler Coal Corporation, 7 IBMA 280 (1977). In this regard I accept the undisputed testimony of the operator's witnesses that they performed many smoke tube tests over a long period of time in the cited cavity and found the ventilation to have been sufficient on all occasions to move air out of the high spot. Based on these tests and the demonstrated inadequacy of the formerly used pump type monitor I find that the operator acted in good faith in converting to the cited testing method. Under the circumstances it cannot fairly be said that the mine operator knew or should have known that the testing method was inadequate. Accordingly I do not find that the violation was due to the "unwarrantable failure" of the operator to comply with the standard. The section 104(d)(1) order at bar is accordingly modified to a citation pursuant to section 104(a) of the Act.

For the reasons discussed above I also find that the operator was not negligent in regard to this violation. In light of the admittedly low hazard associated with the violation, the stipulated history of violations, the large size of the mine operator and the admitted good faith abatement of

the violation, I find that a civil penalty of \$100 is appropriate.

ORDER

The Helvetia Coal Company is hereby ordered to pay a civil penalty of \$100 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge

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rbg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

AUG 12 1985

RICHARD A. FRAME, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. PENN 85-112-D
CONSOLIDATION COAL COMPANY, : MSHA Case No. PITT CD 85-1
Respondent :

DECISION

Appearances: Russell I. Jenkins, Esq., Uniontown, Pennsylvania
for Complainant;
Karl T. Skrypak, Esq., Consolidation Coal Corporation,
Pittsburgh, Pennsylvania, for Respondent

Before: Judge Melick

This case is before me upon the complaint of Richard A. Frame, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging that he was discharged by the Consolidation Coal Company (Consol) on October 29, 1984, in violation of section 105(c)(1) of the Act.¹

In order for the Complainant to establish a prima facie violation of section 105(c)(1) of the Act, he must prove by a preponderance of the evidence that he engaged in an activity protected by that section and that his discharge was motivated in any part by that protected activity. Secretary ex rel David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir. 1981). See also Boitch v. FMSHRC, 719 F.2d 194 (6th Cir. 1983), and NLRB v. Transportation Management Corporation, 462 U.S. 393 (1983),

¹Section 105(c)(1) of the Act provides in part as follows:
"No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . in any coal or other mine subject to this Act because such miner . . . has failed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, . . . of an alleged danger or safety or health violation in a coal or other mine . . . or because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this Act."

affirming burden of proof allocations similar to those in the Pasula case.

In this case Mr. Frame asserts that he refused to comply with his supervisor's work order to move a power cable for the roof bolting machine because of what he perceived to be a hazard of shock or electrocution. Since he was admittedly discharged in part because of that work refusal, Frame argues that his discharge was therefore based at least in part upon his exercise of an activity protected by the Act. A miners exercise of the right to refuse work is a protected activity under the Act so long as the miner entertains a good faith, reasonable belief that to work under the conditions presented would be hazardous. *Robinette v. United Castle Coal Company*, 3 FMSHRC 803 (1981).

Consol does not dispute that Mr. Frame was discharged in part because of his refusal to carry out the noted work order but argues that the directed work was not in fact hazardous and that Mr. Frame did not entertain a good faith, reasonable belief that to perform the work would have been hazardous. A question also exists as to whether Mr. Frame properly notified his supervisor of the reasons for his work refusal in accordance with the Commission decision in *Secretary ex rel Dunmire and Estle v. Northern Coal Company*, 4 FMSHRC 126 (1982).

On October 29, 1984, Richard Frame was assigned to work on the midnight shift under Section Foreman Kirby Cunningham as a general inside laborer/bratticeman. Frame was directed to the tail track to help the roof bolters load supplies for the roof bolting machine. He was later seen helping to load the supplies onto the scoop. Cunningham saw Mr. Frame about 5 minutes later, at approximately 1:50 a.m., standing near a rib, conversing with another miner.

Cunningham then told Frame to help the roof bolters move the roof bolting machine and its cable, and to help load supplies onto the machine. Frame did not respond but walked toward the roof bolting machine. Cunningham left at this point and went to the belt area to check on the feeder. When he later returned he saw a fluorescent light where the roof bolter had been located indicating to him that the machine had not yet been moved. He saw one of the roof bolters start to tram the scoop and the other roof bolter start to tram the roof bolter. Meanwhile, according to Cunningham, Frame was just standing against a rib. Indeed Frame admits that he was just standing around waiting to see what was happening. Cunningham then asked Frame why he was not helping to move the cable for the bolting machine. He told Frame that they

needed help moving the machine cable that was hung across the entries.

According to Cunningham, Frame responded that he was sent to the section as a Bratticeman, that he only hangs tubing and that he does not touch energized cable. Cunningham again told Frame that he wanted him to help move the cable and told him to do what he was told. Frame repeated that he did not handle energized cable and told Cunningham to call him a jeep. According to Cunningham he then asked whether Frame did not want to work. Frame purportedly responded "call me a jeep Mother Fucker, I don't handle energized cable." Cunningham then told Frame that refusing to work and using abusive, profane language was a dischargeable offense. Frame responded "call me a jeep, I'm sick, can't you hear?" Cunningham then told Frame that his time would be stopped because he failed to perform the work he had been directed to perform and because he used abusive, and obscene language.

Frame did not appear to Cunningham to be sick at this time, did not say what was wrong with him other than high blood pressure and declined to see a doctor. Frame was given another chance to return to work but just laughed and said nothing. He then boarded a jeep and was taken out of the mine. His work time was stopped at approximately 2:05 a.m.

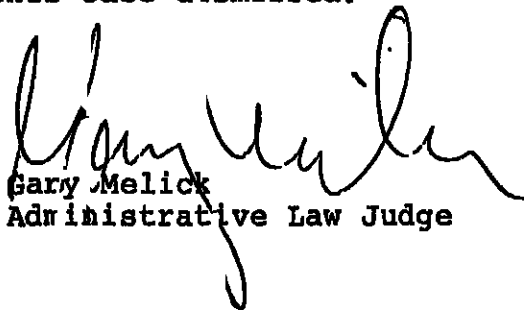
According to Frame he went up to the face after loading supplies for the roof bolters, just as he had been told, and was standing around when Foreman Cunningham came up to him. Cunningham then told him that he was to help the roof bolters load supplies and help with the cable. According to Frame he then responded that he was afraid to handle wet energized cable and at this point Cunningham "blew up", started yelling and stated over and over "do you know what you just did?" Frame alleges that because of Cunningham's reaction he did not have a chance to explain why he was afraid to handle energized cable. He explained at hearing that he was afraid to handle energized cable because he had been shocked by a cable the week before and wanted to have rubber gloves before handling it. He does not dispute that rubber gloves were available on the section and that Cunningham himself had a pair on him at the time. Frame alleges however that he did not have a chance to ask for the gloves.

Mr. Frame readily concedes that it would not have been hazardous for him to have moved the subject cable with rubber gloves. He further concedes that he did not request such gloves from Cunningham or indicate in any way that the reason for his work refusal was his not having such gloves. It is not disputed, moreover, that Cunningham then had on his

person a pair of rubber gloves, that other rubber gloves were also available on the section at the time and that had Frame requested such gloves, they would have been made available.

Frame's contention that he did not request rubber gloves because Cunningham gave him no time to make such a request is not credible.² Frame himself testified that the verbal exchange between he and Cunningham continued for some period of time and that he did not actually leave the mine until some time later. Indeed he complained that Cunningham actually delayed the arrival of the jeep to take him out of the mine.

Under the circumstances I cannot find that the designated work assignment was hazardous. At no time was Mr. Frame denied the use of rubber gloves which even he concedes would have eliminated any hazard associated with the task. Mr. Frame's failure to have requested rubber gloves also demonstrates clearly that he did not act in good faith in his work refusal. Accordingly the charges of discriminatory discharge must be denied and this case dismissed.³


Gary Melick
Administrative Law Judge

²Frame's credibility is further eroded by the testimony of his own witness, Stanley Stockdale, who heard Frame direct profanity toward Foreman Cunningham. Frame had denied using such language.

³These findings are made completely independent of the decision of arbitrator Ralph E. Pelhan on November 26, 1984, and of the determination of ineligibility for unemployment insurance benefits by the Pennsylvania Department of Labor and Industry on November 26, 1984 (and subsequent decisions reviewing that determination). Adequate records of those proceedings were not made available to the undersigned who therefore was unable to fully evaluate those proceedings in accordance with the guidelines set forth in Hollis v. Consolidation Coal Company, 6 FMSHRC 21 (1984).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 13 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 84-352
Petitioner	:	A.C. No. 46-061 03-03508
	:	
v.	:	Valley Camp No. 45
	:	Surface Mine
VALLEY CAMP COAL COMPANY,	:	
Respondent	:	
	:	
VALLEY CAMP COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEVA 84-168-R
v.	:	Order No. 2127007; 3/6/84
	:	
SECRETARY OF LABOR,	:	Docket No. WEVA 84-169-R
MINE SAFETY AND HEALTH	:	Order No. 2127008; 3/6/84
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. WEVA 84-170-R
	:	Citation No. 2127009; 3/6/84
	:	
	:	Docket No. WEVA 84-172-R
	:	Citation No. 2352241; 3/7/84
	:	
	:	Docket No. WEVA 84-173-R
	:	Citation No. 2352240; 3/7/84
	:	
	:	No. 45 Surface Mine

DECISIONS

Appearances: Janine C. Gismondi, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for the Petitioner-Respondent; Laura E. Beverage and Allen R. Prunty, Esqs., Jackson, Kelly, Holt & O'Farrell, Charleston, West Virginia, for the Respondent-Contestant.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern civil penalty proposals filed by MSHA against the Valley Camp Coal Company

pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for four alleged violations of certain mandatory safety standards promulgated pursuant to the Act. The proceedings also include five contests filed by Valley Camp Coal Company challenging the legality of the citations, and an imminent danger order issued pursuant to section 107(a) of the Act.

Dockets WEVA 84-169-R, WEVA 84-170-R, WEVA 84-172-R, and WEVA 84-173-R concern the contested citations, with "S&S" findings, issued pursuant to section 104(a) of the Act, and Docket WEVA 84-168-R, concerns the validity of the imminent danger order. The civil penalty proceeding, WEVA 84-352, concerns the proposed civil penalty assessments for the four contested citations.

Hearings were held in Charleston, West Virginia, on March 12 through 14, 1985, and April 1 through 4, 1985. The parties were afforded an opportunity to file post-hearing proposed findings and conclusions, and the arguments presented therein have been carefully considered by me in the course of these decisions.

Issues

The issues presented in these proceedings are as follows:

1. Whether or not the conditions and practices cited in the imminent danger order constituted an imminent danger within the meaning of section 107(a) of the Act.
2. Whether or not the conditions or practices described in the citations issued pursuant to section 104(a) of the Act constituted violations of the cited mandatory safety standards, and if so, whether or not these violations were significant and substantial.

Additional issues raised by the parties are identified and disposed of in the course of these decisions.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. § 801 et seq.
2. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stipulations

The parties agreed that Valley Camp Coal Company is subject to the Act, and that the presiding Judge has jurisdiction to hear and decide these cases. They also agreed as to the identification, authenticity, and admissibility of their respective hearing exhibits. Any objections to the admissibility of any documentary exhibits were heard and disposed of during the course of the hearing, and they are noted where relevant in the findings and conclusions made in these proceedings.

The order and citations at issue in these proceedings are as follows:

WEVA 84-168-R

Section 107(a) Imminent Danger Order No. 2127007, issued on March 6, 1984, states as follows:

The investigation of a fatal haulage accident at this mine revealed that the following conditions collectively constitutes an imminent danger: the haulage roadway extending from the coal pit was not constructed of material selected to insure stability in that a section of the roadway 200 feet outby the pit was constructed of spoil material with cracks and slips along the elevated edge, the width of the roadway was reduced from 25 to 14 feet where the rock haulage truck involved in the fatal accident slipped from the roadway surface resulting in crushing injuries to the operator as the truck overturned while descending the elevated embankment. § 77.1605(k). The berm provided along the outer edge of the elevated roadway was not adequate to retain the heavy equipment utilizing the roadway in that loose, unconsolidated earth material was used to construct the berms.

§ 77.1600(c). The haulage roadway involved in the accident was not conspicuously marked or warning devices installed to insure the safety of the workers in that the roadway width was reduced from 25 to 14 feet 2 inches with no markers or devices to indicate the change.

§ 77.1713(a). At least once during each working shift an adequate examination was not made

by Ray Hanshaw, day shift foreman, or Lewis Maggard, 2d shift foreman, in that the foreman had traveled the area of the roadway included in the fatal accident and had taken no action to mark the narrow areas, repair the unstable berms, or correct unstable roadway.

WEVA 84-169-R

Section 104(a) Citation No. 2127008, with "significant and substantial" (S&S) findings, citing a violation of mandatory safety standard 30 C.F.R. § 77.1605(k), was issued on March 6, 1984, and the conditions or practices cited are as follows:

The berms provided along the outer bank of the elevated roadway was not adequate to restrain the heavy equipment utilizing the road in that loose, unconsolidated earth spoil material was used to construct the berms. This condition was one of the factors that contributed to the issuance of Imminent Danger Order No. 2127007 dated 3-6-84; therefore no abatement time was set.

WEVA 84-170-R

Section 104(a) Citation No. 2127009, with "significant and substantial" (S&S), findings, citing a violation of mandatory safety standard 30 C.F.R. § 77.1600(c), was issued on March 6, 1984, and the conditions or practices cited are as follows:

The haulage roadway leading to the pit in a fatal accident area was not conspicuously marked or warning devices installed to insure the safety of the workers in that the roadway width was reduced from 25 feet to 14 feet and 2 inches, without markers or devices to indicate the change. This condition was one of the factors that contributed to the issuance of Imminent Danger Order No. 2127007 dated 3-6-84; therefore no abatement time was set.

WEVA 84-173-R

Section 104(a) Citation No. 2352240, with "significant and substantial" (S&S), findings, citing a violation of mandatory safety standard 30 C.F.R. § 77.107-1, was issued on March 7, 1984, and the conditions or practices cited are as follows:

Roy Hanshaw, whose work assignments require that he be certified or qualified has not received the required annual training under part 77.107-1 for certified persons in that Mr. Hanshaw has not received annual training courses in the tasks and duties which he performs at this mine as a certified person since December 4, 1982.

WEVA 84-172-R

Section 104(a) Citation No. 2352241, with "significant and substantial" (S&S), findings, citing a violation of mandatory safety standard 30 C.F.R. § 77.701-1, was issued on March 7, 1984, and the conditions or practices cited are as follows:

Louis Maggard, evening shift foreman at this mine whose work assignments require that he be certified or qualified has not received the required annual training under part 77.107-1 for certified persons in that Mr. Maggard has not received annual training courses in the tasks and duties which he performs at this mine as a certified person since December 4, 1982, and therefore has not been trained within the past 12 months.

Procedural Rulings

When the hearing was convened on Tuesday, March 12, 1985, MSHA's counsel moved to amend the civil penalty proposals to allege a violation of section 77.107, as an alternative to the original citation of section 77.101-1, in connection with citations 2352240 and 2352241. In support of the motion, counsel asserted that both sections deal with training programs and may be read and considered together, and that any evidence adduced during the course of the hearing in support of the citations could be used to support violations of either section 77.107 or section 77.107-1, and that the respondent would not be prejudiced since the citations have been abated and respondent's counsel had been previously notified that MSHA would seek to amend the pleadings to conform to the evidence.

Valley Camp's counsel objected to the proposed amendments to the pleadings, and after hearing arguments on the record, the objections were overruled and MSHA's motion to amend was granted from the bench. My ruling in this regard is reaffirmed. I believe it is clear that under Rule 15(b) of the Federal Rules of Civil Procedure, which apply to this case, 29 C.F.R. § 2700.1(b), I have the authority and duty

to consider issues raised by the evidence, even if they are not specifically pleaded. Further, in view of the fact that Valley Camp was on notice of the proposed amendment and abated the cited conditions, I cannot conclude that Valley Camp has been prejudiced. The courts have liberally construed the rules concerning pleadings, and have held that they are easily amended, *National Realty and Construction Company, Inc. v. Occupational Safety and Health Review Commission*, 489 F.2d 1257 (D.C. Cir. 1973).

Valley Camp's counsel also raised an objection to the testimony of MSHA's witness, Dr. Wu. The basis for the objection was the assertion that Valley Camp was not specifically informed during the discovery in this case that MSHA intended to call any expert witnesses. In addition, counsel asserted that she had no opportunity to depose Dr. Wu, and that absent this opportunity, she was ill-prepared to prepare for his testimony, or to challenge it.

While it is true that Valley Camp's counsel was advised approximately a week or so in advance of the hearing that MSHA intended to call Dr. Wu as a witness, Valley Camp's counsel did accompany Dr. Wu during a site visit to the mine on Monday, March 11, 1985, the day before the commencement of the hearing, and had an opportunity to speak with him. It is my understanding that Valley Camp's counsel did in fact speak with Dr. Wu concerning his knowledge of the facts of this case, and that MSHA's counsel had made a proffer concerning Dr. Wu's testimony.

After further consideration of Valley Camp's objections to Dr. Wu's testimony, it was denied. In addition, Valley Camp's motion for a continuance of the hearing in order to afford Valley Camp an opportunity to depose Dr. Wu was likewise denied. My rulings in this regard are based on my belief that Valley Camp had adequate knowledge as to the nature of Dr. Wu's testimony, and had a full and fair opportunity to cross-examine him. In addition, the parties were advised that I have discretion to weigh Dr. Wu's testimony in light of his knowledge, or lack thereof, of any specific facts of the case, and that any further continuance of the hearings for the purposes of deposing Dr. Wu was not warranted.

MSHA's Testimony and Evidence

MSHA Inspector Homer S. Grose testified as to his background and experience, and he confirmed that he has been an inspector since 1971, and that his experience includes inspections of underground and surface mines. He has

received training, and has attended surface mining training sessions at MSHA's Beckley Mine Academy and Belmont Technical College. Prior to his employment as an inspector, he was employed in the private mining industry, and has worked as a general laborer, jack setter, section foreman, and mine foreman, and he confirmed that he is a certified mine foreman.

Mr. Grose stated that his prior mining experience includes employment in 1969 with the engineering department of the Island Creek Coal Company. This experience included work in underground and surface mine surveying, and he has worked as a roadman and transitman.

Mr. Grose confirmed that he issued the imminent danger order, the citation for insufficient berms, and the citation for lack of warning devices on the haulage road where a fatal accident occurred on March 5, 1984 (exhibits G-1, G-2, G-3). He stated that these citations were issued after the completion of an accident investigation on March 6, 1984 (exhibit G-7). He confirmed that he was in charge of the investigation and authored the report. The evaluations, discussion, and conclusions which are in the report are based on information and statements he received from miners and management representatives interviewed during the course of the investigation.

Mr. Grose identified exhibit G-4 as a series of 25 photographs taken during the course of the investigation on March 6, 1984, and he explained what was portrayed in each of the photographs. He also explained the basis for each of the numbered "evaluations" discussed in numbered paragraphs 1 through 6 of his report of investigation, and confirmed that the information and conclusions stated therein were obtained through his interviews conducted during the investigation. He confirmed that he did not view the haulage road in question prior to the accident, and that all of the information and evidence to support the order and citations which he issued was obtained after the accident during his investigation.

Mr. Grose testified that he issued the imminent danger order because the information he developed during the course of his investigation indicated to him that the roadway was not designed and constructed in a manner consistent with prudent engineering practices. He also believed that the roadway berms were constructed of loose, unconsolidated materials, and that there was loose spoil materials consisting of wet materials, rocks, and loose dirt, which had slipped along the edge of the roadway at the location where

the haulage truck in question had run off the road. He also determined that one portion of the haulage road had been reduced from a width of 25 feet to 14 feet 2 inches, and that this area was not marked or otherwise provided with warning devices to alert or warn the truck drivers. Given these conditions, plus the fact that mine employees reportedly were reluctant to use the road after the accident, he decided to issue the order so as to preclude further use of the road until the conditions could be corrected.

Mr. Grose stated that he measured the axle height of the haulage truck which ran off the road and determined that the distance from the road vertically to the mid-axle of the truck was 22 inches. His measurements of the existing berm heights along certain locations on the roadway were 24 inches, 14 inches, and 18 inches, and the 14 and 18 inch measurements were in the proximity of that portion of the roadway where the truck tires made marks in the roadway before going off the edge. He issued the berm citation after determining that the berm height at the point where the truck left the road was not 22 inches high, and he confirmed that this mid-axle berm height requirement was not in compliance with MSHA's policy guidelines. In addition, he was of the opinion that the berm heights were also insufficient in that the driver of a truck would have difficulty seeing the berm and would be unable to distinguish it from the roadway itself. The inability of the driver to distinguish the berm would impact on safety since the driver would not be able to use the berm to restrain his vehicle.

With regard to the citation for inadequate warning devices on the narrow portion of the roadway, Mr. Grose confirmed that he found no evidence that any such warning devices had ever been installed, and he indicated that mine management did not disagree with his finding in this regard.

Mr. Grose identified exhibit G-8 as a copy of his notes made during the course of his investigation, and he explained how he made his measurements concerning the noted widths of the roadway. He confirmed that the measurements recorded by the mine operator were close to his and only differed by a matter of inches. He explained that the differences were the result of the precise locations and reference points used to make the measurements, and he did not believe that such differences were significant or material (Tr. 58-185).

On cross-examination, Mr. Grose conceded that he had no personal knowledge as to how the haulage road in question

was originally constructed, and he confirmed that no tests or other determinations were made to ascertain the specific materials used in the construction of the haulage road. He stated that he was concerned over the fact that the roadway was not provided with any drainage ditches to allow for water drainage, and he was of the opinion that any water accumulations on the roadway would tend to undermine its stability and would contribute to the slippage of the spoil materials used to support the roadway.

Mr. Grose confirmed that he was not present during the abatement of the order or the citations which he issued. However, he stated that he learned from the inspector who abated the citations that spoil materials were used to construct and repair the roadway, and that the spoil was cut from the highwall side of the haulageway to widen it at the point where it was originally narrow. He conceded that the same spoil materials used to originally construct the roadway were also used to achieve abatement, but that the materials were compacted and consolidated by a bulldozer to insure stability.

Mr. Grose believed that the failure of the outer edge of the roadway, the inadequate berms, and the narrow roadway width all contributed to the fatal accident. In his opinion, the failure of the roadway was due to the lack of prudent engineering design.

Mr. Grose stated that the ground geology and terrain will affect the condition of a roadway, and he conceded that in a contour surface mine such as the No. 45 mine, there is limited room to move equipment on the roadways. He also confirmed that such factors as the speed of the truck, the skill of the driver, and his knowledge of haulage procedures should all be considered in determining the safe utilization of the roadway.

Mr. Grose indicated that he determined that the accident victim Bruce Hartwell had driven trucks on the haulage road in question at least two weeks prior to the accident, and that the roadway was changing during this period of time in that portions of the roadway were slipping and failing..

Mr. Grose confirmed that his investigation revealed that at least one ground slip had occurred on the roadway at least two weeks prior to the accident when the roadway was constructed. He also confirmed that an unidentified employee advised him that another slip had occurred at the accident area, or in close proximity to the location where

the truck left the roadway, and that drivers were reluctant to use the roadway. The condition was corrected by moving spoil material from the adjacent bank into the affected portion of the roadway which had failed. The roadway was also widened in this same manner at that time.

Mr. Grose stated that he measured the roadway width at the location where the truck went over and that it was 14 feet, two inches wide. He identified the map included as part of the accident report (G-7), and stated that he had "no problem" with the accuracy of the measurements or the information shown on the map.

Mr. Grose identified photograph No. 3 in exhibit G-4 as the tire tracks of the truck as it left the road. He also confirmed that photographs numbered 3, 6, and 10 show no evidence of any braking or sliding by the truck. He believed that the weight of the loaded truck expedited the road failure process, and that other factors, including standing water, indicated that the roadway was failing. He conceded that his order and accident report do not state that the presence of any water, or lack of adequate water drainage, were factors contributing to the failure of the roadway.

Mr. Grose confirmed that he had no knowledge of the mine haulage procedures, but that a mine representative advised him that the general widths of the mine haulage roads were 20 to 30 feet wide. In response to further questions, he stated that given the history of roadway slippage, and given the fact that heavy equipment used the roadway, which was slick and wet, he would have insured that the roadway materials were compacted, and he would have sought advice from "higher mine management" as to how to maintain the roadway in a safe condition.

Mr. Grose was of the opinion that the roadway berms should be high enough to permit the equipment operators to visually observe them so that the trucks would be deflected back onto the roadway in the event they encountered the berm. In his opinion, the berms should have been constructed with a wide base, and at heights of six to eight feet. He also believed that the mine operator should have made a better selection of materials to construct the roadway, and should have insured that the materials were adequately compacted. He confirmed that he did not survey all of the berms along the haulage roadway in question.

Mr. Grose stated that an eyewitness to the accident had stopped his truck on the outer portion of the roadway to allow the right of way to the loaded truck which went off

the road to pass between him and the base of the spoil bank on the inside of the roadway, and that this was a standard practice (Tr. 185-320; 335-445).

MSHA Inspector Beauford T. Slaughter testified that he has 18 years of experience in surface mining and that he has been employed as an MSHA surface mining inspector for 10 years. His prior mining experience includes work as a shift foreman and equipment maintenance work. He confirmed that prior to the accident he last inspected the No. 45 mine in July 1983, but the roadway was not inspected because mining had not yet progressed that far and the road was not as yet built.

Mr. Slaughter confirmed that he assisted Inspector Grose during his accident investigation and helped him make his measurements. He also confirmed that he reviewed the mine training records on foremen Roy Hanshaw and Louis Maggard and found no evidence to establish that they had received annual refresher training as required by MSHA's Part 77 regulations. Company records indicated that they last received training on December 14, 1982 (exhibits G-11 and G-12).

Mr. Slaughter identified exhibit G-12 as the MSHA approved training program for the mine. He asked mine management for evidence of any training received by the two individuals subsequent to 1982, and when it could not be produced he issued the citations. He believed that the negligence was moderate because he was not sure whether the two individuals were not trained or whether the company records were lost. The citations were terminated by another inspector after the training was given.

Mr. Slaughter confirmed that he terminated Mr. Grose's imminent danger order after meeting with MSHA and State of West Virginia officials and verifying that proper abatement methods were followed. The affected road materials were removed by a bulldozer, but he did not observe the entire reconstruction of the roadway and was only present for part of the abatement. He observed the materials used to repair the roadway, and he described them as a "gray, slate-like material." The material he observed on the outer edge of the roadway which had failed was different material, and upon observation prior to the abatement, it appeared to be brown in color, and appeared to be loose spoil and rock. He also believed that the materials used to construct the outside edge of the roadway was different from the materials used on the inside portion of the roadway. The outside roadway portion consisted of soft materials incapable of

holding the truck, and he believed that this portion of the roadway was unsafe.

Mr. Slaughter stated that he was only present for a half hour during the abatement, but he believed the dozer dug up the roadway which needed to be repaired to a depth of two to three feet. After the abatement was completed, he observed that the berms were constructed higher and larger than they were at the time of the accident, and while he did not measure them, he believed that after abatement, the berms were three to four feet high, with a three foot base. All of the old berm was taken out and replaced during the abatement. After the roadway slipped, he considered it to be unsafe.

Mr. Slaughter confirmed that he regularly inspected the mine at least two times a year, and he did not believe it was unusual for a roadway to permit the passage of only one truck at a time. After abatement, the roadway was 16 to 18 feet wide, and stakes with signs stating "one lane traffic" were installed where the roadway permitted the passage of only one truck at a time (Tr. 489-490). With regard to the training citations, Mr. Slaughter stated that he would have accepted the State certifications for medical technician training in lieu of the required first aid training, but that he did not know about these certifications when he issued the citations (Tr. 452-495).

On cross-examination, Mr. Slaughter confirmed that prior to the accident, he had visited the mine on at least 20 or more occasions during his inspections. He indicated that the last page of the training plan covers the required "Part 77" training requirements. He believed that the cited mandatory standard requires annual training for both qualified and certified persons, and he conceded that Mr. Hanshaw and Mr. Maggard were "certified persons" under the applicable state law.

Mr. Slaughter testified as to what he believed the training requirements under Parts 77 and 48 to be (Tr. 496-500; 509-512). He confirmed that he found no evidence that the two cited individuals had been trained in 1983, and that this formed the basis for the citations (Tr. 517-519). He believes that "refresher training and retraining" are synonymous terms (Tr. 520).

Mr. Slaughter confirmed that he terminated the imminent danger order, and he described the area where the abatement work took place (Tr. 526-535). He confirmed that he never issued any previous citations at the mine for narrow road

widths, and he could not recall whether he had issued any previous berm citations (Tr. 538).

Mr. Slaughter stated that in order to satisfy the requirements of Part 77, certified individuals have to undergo training under Part 48, and that this training could be used for 'certified individuals (Tr. 544). He explained the different provisions of the applicable training program, and the operator's obligations pursuant to the plan (Tr. 545-551).

James W. Westfall, testified that he was employed at the No. 45 surface mine in March 1984, and that he started work there on February 8, 1984. He was employed as a truck driver, and was at work on the evening shift on the day of the accident. He confirmed that he operated one truck along the haulage road, and that the accident victim, Bruce Hartwell, operated a second truck. Mr. Hartwell made the first trip, and Mr. Westfall made the second one.

Mr. Westfall stated that immediately before the accident he pulled his truck over to the outside portion of the roadway in anticipation of Mr. Hartwell passing him on the inside between his truck and the spoil bank.

Mr. Westfall identified photograph No. 2 in exhibit G-4 as the area where his truck was stopped, and he stated that he first observed Mr. Hartwell as he came around the curve in the roadway at the area shown in the top of photograph No. 22, and that he was travelling at an approximate speed of 5 to 10 miles per hour.

Mr. Westfall stated that he observed Mr. Hartwell attempt to get out of the truck as it began to leave the roadway, but he could not state precisely where he saw Mr. Hartwell on the roadway when he first observed him because he was not paying close attention to him. He stated that Mr. Hartwell attempted to get back onto the roadway after his truck was at the edge of the roadway, and that his front wheels were cut to the left towards the roadway. He believed that Mr. Hartwell had skidded over to the edge of the roadway, but that he was over "too far," and that is what caused him to skid towards the outer edge. He believed that Mr. Hartwell was "on or close to" the berm, but he was not sure whether he skidded or drove off the edge of the roadway.

Mr. Westfall stated that it appeared that Mr. Hartwell's truck "took out the berm" and that the truck appeared to begin to turn over "in slow motion" as it began to go

over the edge. Mr. Westfall indicated that the roadway surface was wet and that there was a "drizzly" rain all day.

Mr. Westfall stated that when he travelled the roadway he always stayed away from the berm because the presence of the berm indicated to him that this was an area to stay away from. He confirmed that he never encountered any problem driving through the accident area, and that he would be approximately a foot from the berm as he would pass along the roadway near the scene of the accident.

Mr. Westfall stated that a loaded truck always has the right of way on the roadway and that empty trucks always stayed to the outside to permit loaded trucks to pass to the inside. There are several narrow road locations where empty trucks pull over to yield the right of way to loaded trucks coming in the other direction.

Mr. Westfall confirmed that he had worked with Mr. Hartwell in the past and that he considered him to be a good driver, and he was not aware of any problems with Mr. Hartwell's driving ability. Mr. Westfall also confirmed that drivers normally do not wear seat belts.

Mr. Westfall identified exhibit G-13 as a statement he signed for the Kanawha County Sheriff's office after one of its representatives interviewed him during the course of the accident investigation. Mr. Westfall stated that after the accident, he would not drive his truck on the roadway because he was too "shook up" (Tr. 557-580).

On cross-examination, Mr. Westfall identified photograph No. 2, exhibit G-4, as an area where he knew that only one truck could pass. He stated that a loaded truck should always "haul toward the spoil," and that he would always stop in a wide area with an empty truck and wait for the loaded truck.

Mr. Westfall stated that after he stopped his truck to wait for Mr. Hartwell, the mine superintendent passed him in a Ford Bronco shortly before Mr. Hartwell came around the curve (Tr. 587). Mr. Westfall confirmed that he had never driven into the berm and never experienced any trouble in traversing the roadway. Although safety meetings are normally held on Mondays, Mr. Westfall could not specifically recall whether such a meeting was held on the day of the accident.

Mr. Westfall confirmed that he had also driven over the other mine haul roads, and that there were several places

where only one vehicle could pass, and that he did not consider this to be unusual. He also confirmed that he had worked at other mine sites and the road construction at those mines was similar to the road construction in question in this case (Tr. 586).

Mr. Westfall stated that when he observed Mr. Hartwell's truck close to the outer edge of the roadway, there was room close to the spoil side, and he indicated that "there was bound to have been room over there" (Tr. 589).

Eric V. Augustine, was called as Valley Camp's witness, and he testified that he is now laid off from his job at the Valley Camp Coal Company, but that prior to December 1984, he was the chief engineer, and was employed in this capacity on the day of the accident. He is a graduate of Lehigh University, with an inter-disciplinary degree in mechanical engineering and systems level biology. He was informed of the accident by a telephone call to his office located in the town of Shrewsbury, some 15 minutes from the mine site. He went to the accident scene the next morning and accompanied the inspection team during its investigation. He was with Inspector Grose for approximately 35 to 45 minutes while conducting a preliminary visual inspection of the accident scene. Mr. Grose then asked him to produce a map of the area, and since Mr. Grose indicated that he wanted a scale map which would fit in a folder, Mr. Augustine took this to mean a map 8-1/2 by 11, or "legal size." Mr. Augustine believed that this would be difficult to produce, and after further discussion, it was agreed that the map would be to "20 foot scale," with "five foot contour" lines. Mr. Grose also suggested that the location of berms be included on the map, as well as other information concerning the accident (Tr. 594-605).

Mr. Augustine stated that he "stayed close" to the inspection party the day after the accident so that he could take notes and listen to what may be required to produce a map, and he confirmed that he began the actual site survey after the inspection party left at noon that same day. His survey crew consisted of a rodman, a transitman, and a draftsman who took notes, and they were all experienced men. Mr. Augusttine supervised them during the survey (Tr. 608-610).

Mr. Augustine stated that the map which appears as part of MSHA's accident report (exhibit G-7), was not the final map he produced, and he indicated that it was a reduced photocopy of his map (Tr. 614). He stated that he could not make any measurements from the map in the accident report,

and that he would need the original map to verify distances accurately.

With regard to his original map, exhibit ALJ-1, Mr. Augustine stated that the single asterisk numbers are primarily road widths measured by his crew during the survey (Tr. 623). The double asterisks are MSHA's measurements (Tr. 632). In response to questions concerning some of his measurements, Mr. Augustine stated that the measurements depict an area from the outermost discernible tire tracks on the road. He explained that he used these measurements because prior to contour surface mining, "a dirt road is where there are tire tracks, not a flat area" (Tr. 626). He explained further that a road was not considered to be the width of the bench, but rather, the area where the vehicles traveled. This distance was determined by measuring the outside-to-outside tire tracks or "usable roadway" (Tr. 626).

Mr. Augustine explained how he plotted the elevation contour lines shown on his map (Tr. 634-646). He conceded that he could not tell what type of vehicle made the tire tracks shown on photographic exhibit CR-3, and he marked the areas on the photograph where he placed his tape measure to measure the width of the useable roadway, and he explained how the distances were determined (Tr. 662-665). When asked whether anyone measured between the two points drawn on the exhibit, Mr. Augustine stated that "I measured the tire tracks" (Tr. 667). He also explained his observations as he watched Inspector Grose make his measurements with a cloth tape (Tr. 668-670).

Mr. Augustine stated that he and his crew took three and one-half hours to survey the accident area, and that he applied acceptable survey practices in making his map (Tr. 671). He confirmed that the subject surface mine is adjacent to a nearby underground mine and that there are known surveyed elevations within the underground mine. He also confirmed that Valley Camp has done extensive core drilling operations to ascertain "the dip of the coal" (Tr. 673). He stated further that any water below the surface would tend to collect to the base of the highwall, and that the horizontal distance from the base of the highwall to the outermost edge of the bank where the truck went over was 130 to 140 feet (Tr. 675).

On cross-examination, Mr. Augustine explained the significance of the "certification" process for mine maps, and he confirmed that the map which is a part of MSHA's investigative report is not "certified" (Tr. 683). He

confirmed that he is not a registered engineer or surveyor, and that none of his survey crew were registered surveyors (Tr. 684). He reiterated the significance of the elevation contour lines as shown on the map which he produced, and he explained how the information appearing on the map was obtained (Tr. 685-693). He confirmed that the contour lines are of no use in determining the width of the roadway (Tr. 93).

In response to questions concerning any discrepancies in his measurements of the width of the roadway, and those made by Inspector Grose, Mr. Augustine indicated that it would depend on the point of reference used in the measurements, and that measuring from tire track to tire track, as opposed to measuring from the base of the spoil bank to the berm would account for some of the differences and discrepancies (Tr. 720-724). He also believed that his measurements were more accurate than the inspector's, and that it was possible that the person holding the other end of the inspector's tape measure may have been standing two feet from the end of the road (Tr. 729). Mr. Augustine demonstrated how he arrived at certain measurements by using a triangular engineer's ruler, and he did so in response to questions from MSHA's counsel (Tr. 735-739).

Mr. Augustine stated that he was not aware of the fact that a portion of the roadway was falling or slipping out on the morning before the day of the accident, but that two weeks before the accident he was aware that "there had been some movement of the material downslope from the road" (Tr. 764). When asked to explain how he became aware of this condition, Mr. Augustine responded as follows (Tr. 766-769):

Q. Okay. Well, let me ask you this: How did you become aware of the slip two weeks previous to the accident?

A. Let's see, in the process of driving through the area. It was not such that -- you know, I'd seen it, went through the area or had noticed that, you know, there were no trees, this gap and no trees down below, and went through it and just had a casual conversation with the pit formen at the time.

Q. Was that on the day shift or the evening shift?

A. That probably would have been around shift change. That's usually when I tried to get up

there. I found it more productive for use of my time.

Q. Okay. Well, who did you have the conversation with?

A. It would have been one or both of the shift foremen, and it was -- what happened down there, well, it was moving a little bit, so, you know, it was taken care of.

Q. Okay. So, you didn't play any part in the correction of the slip?

A. No. No. No.

Q. The one that was two weeks before the accident, right?

A. Yeah.

Q. Okay. And you didn't know about the one that was the morning of the accident?

A. No.

* * * *

THE WITNESS: Well, I was about to say that it was in the area --

JUDGE KOUTRAS: Where?

THE WITNESS: In the area of the accident.

JUDGE KOUTRAS: Two weeks before, you saw a slip, evidence of a slip?

THE WITNESS: Some material movement. Yes.

JUDGE KOUTRAS: Okay. All right.

BY MS. GISMONDI:

Q. Was there anything else? Did you have any other involvement with this, other than you had a casual conversation with one or both of the foreman and they said it was corrected and -- was there anything beyond that, any involvement that you had --

A. Based on my observation, you know, based on my observation, my question satisfied the -- you know, I'd satisfied my information request on the way out, there was no material movement in the consequent -- and I was up there, we brought an auger up later through the area, or there was an auger brought up at about that time sometime. I went up and was checking on the auger, would drive through and glance down over the road. That's the kind of thing where you notice -- you know, people tend to notice things as they change, not that something's the same for 15.2 days, and I just looked at it because that's -- I drove by it. But, I had no information in hand to be concerned about it or to generate some kind of investigation.

Q. Did you look at it from the road's surface, or from the side of the road?

A. Well, from, you know, walking down over the berm, getting down on the slope. Because from, you know, looking down at that distance, you know, sometimes in the evenings you can't really -- because of the shadows, you can't tell -- of displacement, whether it's displacement or a shadow, and I was curious enough to walk down there and wasn't overly impressed with the severity of it.

Mr. Augustine stated that he travelled the roadway in question prior to the accident and viewed the berms. Although he did not measure them, he indicated that he did walk over them and he estimated that the height of the berms were "somewhere between the height of my knee, and my, you know, my belt buckle, my waist" (Tr. 778). He estimated the heights to be between 19 and 31 inches (Tr. 778). He did not view the berms on the day of the accident (Tr. 779).

Winford L. Saunders testified that he was employed at the No. 45 mine from November 22, 1979 to February 20, 1985, when he was laid off. He was employed as a "heavy truck driver, and he is familiar with the haulage road where the accident occurred. He identified the photographs in exhibit G-4 as the haulage road area in question, and he believed the roadway had been in existence for at least 60 days prior to the accident, or at least until all of the coal was mined (Tr. 906-909).

Mr. Saunders confirmed that he took part in the construction of the roadway, and he indicated that spoil and overburden materials taken from the spoil pile were used in its surface construction. The materials were trucked from the pit to the roadway location, and then dumped and spread out by a bulldozer. The roadway materials consisted of the outcrop of shale, sandstone, soil, and some rocks. The larger rocks were not used, and while some of the materials were used to construct portions of the roadway, other spoil materials were left on the inside of the spoil bank to serve as the inside of the roadway. Mr. Saunders indicated that the spoil materials were not separated or sized, but that the outcrop consisting of shale and dirt provided the main source of the materials for the roadway. He described a roadway "lift" as a layer of materials six to ten inches high which is compacted on the roadway by equipment running over it, and this serves as the roadway surface and base (Tr. 910-922).

Mr. Saunders stated that there was a water problem with the roadway area during "this entire period." He stated that water was coming out of the coal seam and running under the spoil bank and roadway. He observed some slips in the roadway areas in question, and he mentioned evidence of earth and tree movement as an indication that the bank adjacent to the roadway was slipping. He specifically recalled a large beech tree approximately 60 feet from the edge of the roadway incline which he observed "leaning and moving," and each day he viewed it, it was leaning and moving more. He called this to the attention of foreman Roy Hanshaw, and Mr. Hanshaw informed him that he "would watch it." Mr. Saunders also indicated that the beech tree in question was also discussed in safety meetings (Tr. 922-934).

Mr. Saunders believed that water was trapped behind the spoil bank and was leaking through the roadway. He also believed that the source of the water was an old abandoned underground mine which had been augered through, thereby releasing 10,000 gallons of water per minute. Mr. Saunders indicated that mine engineer Eric Augustine was aware of the presence of the water, and that a week or two before the accident, the water washed out part of the haulage road materials. The water washed fresh dirt "down to the solid" portion of the roadway, and Mr. Saunders asserted that nothing was done to correct the condition. He stated that Foreman Hanshaw was working the day the water was released, and the force of the water pushed the auger out of the bore hole. Augering was done in an effort to recover some of the

coal left in the abandoned underground pillars (Tr. 934-941).

Mr. Saunders identified photograph #3, exhibit G-4, as the bank adjacent to the roadway, and he indicated that on the day of the accident four feet of that roadway had slipped. He believed that the slippage was caused by rain and mud. Because of this condition, a 12-foot wide truck could not pass through the roadway, and he and another truck driver, Clarence Coleman, refused to drive their truck through the area because of the road condition. Mr. Saunders believed that Foreman Hanshaw was informed of the condition, and that he instructed end loader operator Bruce Estep to "take enough spoil out of the bank" to permit the trucks to cross the area (Tr. 948-953).

Mr. Saunders stated that Mr. Estep widened the road by digging into the inside adjacent spoil bank, and that Mr. Estep dumped the materials which he had dug out of the bank over the edge of the roadway where it had slipped, and simply left it there. After the roadway was widened in this manner, there was room for the trucks to pass, but it was a "tight fit." Mr. Saunders indicated that he had to "hug the spoil bank" to maneuver through the area, and had a one-foot clearance on either side of his truck. He estimated that the roadway had been widened by two to three feet on the inside, and one foot on the outer edge by the process of digging into the spoil bank and dumping the material at the edge of the road. Mr. Saunders stated that while Mr. Hanshaw did not personally come to the area prior to the work done by Mr. Estep, he believed that had Mr. Hanshaw seen the condition he would have told the truck drivers about it (Tr. 954-959).

Mr. Saunders identified the pile of material shown on the edge of the roadway in photograph #2, exhibit G-4, as a three foot high berm, approximately three feet thick. The purpose of the berm is to warn a driver that he is at the edge of the roadway, and Mr. Saunders indicated that he does not like to get too close to the berm. In his opinion, a berm should be constructed at least six feet thick at the base, and with a height of four feet or more, so that he can observe it or "feel it" with his truck. He believed that an 18 to 22 inch berm constructed of loose mud and materials is insufficient to serve as any warning (Tr. 962-967; 990-992).

Mr. Saunders stated that he had driven the same truck driven by the accident victim and found nothing wrong with the truck. After the accident, he would not have driven

across the roadway because he did not believe it was safe (Tr. 994).

On cross-examination, Mr. Saunders conceded that he drove on the roadway with his truck prior to the day of the accident. His normal truck speed is maintained at five to ten miles per hour, and if it is raining, the speed is maintained at approximately seven miles an hour with fully loaded truck. He believed that a loaded truck at this speed should be able to stop within 20 feet after the driver applies all of his brakes (Tr. 995-997).

Mr. Saunders stated that the haul road was maintained by a dozer or loader, and the only time a scraper was used was when someone complained about the road condition. He recalled filing a safety complaint in the past on another haul road, but could not recall the details. He did not report any specific road conditions to anyone on the day of the accident, and when asked why reports are not made, he answered that he was reluctant to complain because he wanted to keep his job (Tr. 1063).

Mr. Saunders stated that the auger in question was operating against the highwall at the same level as the pit, and that it was located approximately 200 to 300 feet behind the open pit. Water was coming out of the coal seam at the bottom of the highwall, and he believed that this was a common occurrence. Mr. Saunders stated that the haulage road in question was approximately 1200 feet long, and that there were times when there were no berms on it at all. He maintained that berms were constructed by mine management as soon as they believed that an inspector was on the way to the mine to conduct an inspection.

Mr. Saunders stated that there was a "serious water problem" in the haulage road area, and he attributed this to augering which he believed began sometime in February or March 1984 (Tr. 1029). He indicated that the water was coming out of the coal seam, and he confirmed that this is common when mining is conducted around deep mines (Tr. 1032). He indicated that the water was present in the pit under the spoil and that "it was just sitting there" in pools, and possibly running off to the outside lowest portion of the pit (Tr. 1033-1035).

Mr. Saunders alluded to the fact that the haulage road in question along the accident scene was only one-lane wide. However, when asked to explain further, he stated that a disabled bulldozer was parked along the edge of the roadway

and that is what caused the roadway to be narrowed down to one lane (Tr. 1074-1076).

Bruce Estep testified that he has been employed at the No. 45 mine for approximately four and one-half years as a day shift end loader operator. He stated that he was familiar with the scene of the accident along the haulage road in question, and he identified the photographs in exhibit G-4 as the area where the accident occurred.

Mr. Estep confirmed that he participated in the original construction of the haulage road, and he stated that road construction was accomplished with an end loader, a bulldozer, and three trucks transporting road materials. Road construction was usually done during the day shift. The materials used for the roadway construction consisted of spoil and overburden which had been shot. The material consisted of small rocks and dirt which was hauled and backfilled on the roadway and spread out to a height of four to four-and-one-half feet by a bulldozer. Although there was no separation of the materials, large rocks were removed, and the materials were hauled and dumped on the roadway as it was dug out. The dozer operator compacted the roadway as it was being constructed, and the berms were then added. The dozer operator usually supervised the construction, and the foreman, Roy Hanshaw, usually did not give day-to-day instructions to the crew as to how to go about their road construction duties (Tr. 1085-1091).

Mr. Estep stated that during the construction of the road, there was water in the materials removed from the pit and used to construct the road. The pit area was approximately 150 to 200 feet from the accident scene, and water seepage was present in the pit where the coal was being removed. He identified the water shown on photograph #2 in exhibit G-4, as "water under the spoil pile," and he indicated that any water which was detected in the pit area was usually covered over with spoil materials. Mr. Estep believed that the area circled in photograph #4, exhibit G-4, approximately eight to ten feet below the roadway, was standing water, and he was concerned because he believed the water affected the outer edge of the roadway (Tr. 1091-1095).

Mr. Estep testified that there was a slip in the roadway area shown in photograph #3, exhibit G-4, at the area shown by the crib block which appears in the photograph, and he stated that he observed this slip two weeks before the accident occurred. He could not state whether the foreman observed it. Mr. Estep stated that the slip extended for an

approximate distance of 150 feet from the crib block towards the back of the photograph. He also indicated that the berm had slipped off the edge of the roadway for a distance of 30 to 40 feet, and that it had been replaced. He believes that this berm condition had been brought to the attention of the foreman. Prior to the slip, berms had been constructed to a height of two feet, but they were later reconstructed to a height of three to four feet. He confirmed that the height of the berms depends on the width of the available roadway. Prior to the accident, the roadway at that location was approximately 14 feet wide (Tr. 1096-1110).

Mr. Estep confirmed that he did not participate in the road repairs or berm construction after the accident, and he indicated that the roadway ceased to be used six months after the accident because mining had been completed in the area.

Mr. Estep stated that the roadway in question was constructed approximately three weeks before the accident, and that during this time there were indications of soil and tree movement along the bank of the roadway. He did not discuss these conditions with anyone, and while he did not know whether any of the foremen were aware of these conditions, he "was sure" that they were (Tr. 1110-1114).

Mr. Estep stated that on the day of the accident a portion of the roadway approximately 50 feet from the accident scene slipped, and he identified the location of this slip as the area at the "top and around the corner" of the roadway shown in photograph #3, exhibit G-4. On that same day, Mr. Estep walked the portion of the roadway shown in photograph #2, exhibit G-4, and trucks were parked around the corner behind the truck shown in the photograph. Truck driver Winford Saunders advised him at that time that the drivers refused to drive the roadway because "part of the road was gone." Mr. Estep then called foreman Roy Hanshaw, and Mr. Hanshaw instructed him to "make room for the trucks to get by." Mr. Estep then took some spoil materials to fill in the road, dumped it on the side of the road, and leveled it out with his bucket, and replaced the berm. He identified the location of this slip and the work that he performed to correct the condition as the area "near the pit," and around the corner and out of sight of the roadway as shown in photographic exhibit C-R-1. As for the immediate area of the accident, Mr. Estep stated that he noticed that about three to four feet of berm had fallen or slipped, and that the berm "was completely gone" (Tr. 1114-1129).

Mr. Estep stated that the roadway width at the accident scene was 12 to 14 feet, and he considers this to be a narrow road. He believed that the remaining portion of the roadway was also 14 feet wide, and he confirmed that he had never been specifically instructed as to how to construct a berm. He conceded that using MSHA's "axle height" guideline was difficult because the roadways were narrow. He believed that the purpose of a berm is to alert someone that they are "over too far." He would construct a berm four to four and one-half foot high and six feet wide so that a driver could see it (Tr. 1130-1133).

Mr. Estep stated that Mr. Hanshaw advised him to repair the roadway so as to permit the truck to pass and that he was to make enough room to allow a D-8 dozer to come to the area. Mr. Hanshaw advised him that the dozer would finish the road repair after Mr. Estep had completed his work. Mr. Estep believed that the repairs that he made to the roadway would permit a truck to drive into the pit, but he did not believe that it was safe for the trucks to drive out, and he would not have done so with a loaded truck. After the accident, he observed that the berm had "dropped down" two to three feet for a lateral distance of approximately 20 to 30 feet (Tr. 1134-1142).

On cross-examination, Mr. Estep confirmed that he served as a member of the mine safety committee before and after the day of the accident, and he conceded that even though he observed roadway slippage prior to the accident, he failed to report it to anyone. He stated that he did not consider the presence of water to be an unsafe condition while the roadway was being constructed, and he believed that the water was coming from an old coal seam under the roadway. Aside from the roadway being narrow, he did not believe it was unsafe to travel over the roadway while it was being constructed. He never refused to use the roadway, nor did he ever refuse to load materials on any trucks on the roadway during its construction. Although he observed trees leaning, and believed that this was an indication of an unsafe condition, he did not report this to anyone. He indicated that in his experience at the mine, berms were always constructed to a height halfway up the axle of the biggest piece of equipment using the roadway, and that berms were constructed three and one-half feet high, which is the "mid-axle height" of a 988 end loader (Tr. 1145-1163).

David Nichols testified that he was last employed at the No. 45 mine in December 1984, as an end loader operator on the evening and day shifts. In March 1984, he worked the evening shift, and he was at work on the day of the accident.

After reporting for work that day he spoke with foreman Louis Maggard at the mine office, and Mr. Maggard informed him that "a piece of the road" needed to be repaired. Mr. Nichols confirmed that he traveled the haulage road in question at approximately 4:15 p.m. that same day and observed that the road was narrow at the location of the accident, and that there was no berm there except for one which appeared to be six to eight inches high. The berm appeared to have subsided or "slipped," and he assumed that this was the area that Mr. Maggard had in mind when he mentioned that "part of the road" needed to be repaired. Mr. Nichols stated that while he believed the road was not safe to travel, he did not report his observations to anyone because he assumed that this was the condition mentioned to him earlier by Mr. Maggard (Tr. 1164-1173).

Mr. Nichols stated that after passing the area which he believed was not safe to travel, he proceeded to the pit and loaded Mr. Hartwell's truck first, and then Mr. Westfall's. He loaded Mr. Hartwell a second time, and the accident occurred shortly thereafter. Mr. Nichols identified photographic exhibit G-4(3) as a photograph of the area which he passed on his way to the pit, and he identified what he believed to be a slip of the berm and roadway. He confirmed that a week before the accident he observed some trees "leaning and down" in the area of the bank adjacent to the roadway, and this led him to believe that the bank was slipping. He stated that he informed Mr. Maggard about his observations.

Mr. Nichols testified that he did not construct any berms on the haulage road in question, but that he has constructed them at other mine sites where he had previously worked. He confirmed that he did construct berms at other locations at the No. 45 mine, and that this was usually done by dumping and piling spoil materials with his end loader. He was aware of MSHA's "axle height" guidelines for berm construction, and he indicated that he usually constructed them four-and-one-half to five-feet high because that was his usual practice at other mines (Tr. 1174-1192).

On cross-examination, Mr. Nichols stated that he did not participate in the original construction of the haulage road, but that he did travel over it prior to the accident and always made it a practice to stay close to the inside of the roadway adjacent to the spoil pile. He confirmed that he did not inform Mr. Maggard about the slip conditions which he observed prior to the accident because foreman Hanshaw and mine manager Pendergast were "close by," and he

assumed they were aware of the conditions (Tr. 1192-1200; 1207-1210).

Mr. Nichols stated that he was not aware of any other slips in the roadway prior to the accident, and he confirmed that he was not present when the berms were reconstructed after the accident. He helped repair the roadway after the accident, and he indicated that the loose road materials were taken out "down to the rock," and additional road materials were used to make the repairs (Tr. 1204-1206).

Dr. Kelvin Ke-Kang Wu, Chief, Mine Waste and Geotechnical Engineering Division, MSHA, Pittsburgh, Pennsylvania, testified as to his background and expertise. He confirmed that he has a Ph.D. Degree from the University of Wisconsin in the field of soil mechanics and rock engineering. He is a registered professional mining engineer and has ten people on his staff at MSHA's Bruceton Safety Technology Center. In addition to his duties with the Department of Labor, he is an adjunct Professor at the graduate school of the University of Pittsburgh, teaching courses in mining geology and mine systems evaluation, and he has conducted seminars at the University of Alabama teaching courses in waste impoundment inspections (Tr. 1246-1253; 1261).

Dr. Wu stated that his work with MSHA involves the evaluation of waste and other mine impoundments, and work in connection with the stability of surface mining highwalls, benches, and pits. Part of his work entails the review, evaluation, and approval of waste impoundment and highwall control plans, and he has provided consultant and evaluation advice in areas such as highwall and bench stability, highwall failures, roof control engineering assistance, mine system evaluations, materials handling equipment evaluations, and matters dealing with roads at waste impoundments and surface mining facilities. He has also taught courses at MSHA's Mine Academy in Beckley, West Virginia, and these include the training of qualified people for impoundment inspections, water, waste, and slurry impoundment inspections, and the inspection of coal washing plants. He has also been called upon to provide advice in connection with enforcement problems which occur from time-to-time, and he indicated that 30 percent of his working time is spent in the field at various mine sites when his services are requested by various MSHA mine district offices (Tr. 1254-1261).

Dr. Wu stated that he has served as the chairman of the AME Health and Safety Committee, has published articles on

such subjects as rock and soil mechanics, slope and impoundment stability, and that three of the courses which he teaches at the University of Pittsburgh include studies in mine system evaluations, soil and rock mechanics, and underground mine layouts and designs. Although he has no direct experience in the actual construction of surface mining haulage roads, he indicated that all of these courses "touch on" that subject, and that roadways at waste and slurry impoundments are similar to those haulage roads found at surface mining facilities. He has also been involved in the review of water and waste impoundment plans submitted to MSHA for evaluation and approval, and his experience includes the interpretation of mine maps, and he is a professional land surveyor registered in the State of Pennsylvania (Tr. 1262-1265).

Dr. Wu stated that he was initially contacted to become involved in these proceedings by his Center Chief on Wednesday, March 6, 1985, but that his initial reaction was to decline because he did not have all of the facts, and he had not visited the site of the accident. A second contact and request for his services was subsequently made through MSHA's Arlington, Virginia, Solicitor's Office, and he then agreed to visit the site. The site visit was made on Monday, March 11, 1985, the day before the start of the hearing, and he was accompanied by counsel representing the parties in this case, as well as the inspectors who issued the citations, and other safety representatives of the company. As part of his preparation for testifying in these proceedings, he interviewed and spoke with the inspectors, other witnesses, reviewed the citations and order, and MSHA's report concerning the accident investigation conducted by Inspector Grose and the inspection team. He has also reviewed all of the photographic exhibits introduced during the hearing, and was present during the testimony of the witnesses during March 12 through 14, 1985 (Tr. 1274-1276).

Dr. Wu confirmed that he had no personal knowledge of any of the facts or events which transpired before or after the accident in question, except for his review of the facts and circumstances as related to him by others, and his review of written reports and materials in preparation for the hearing. He confirmed that the haulage road where the accident occurred is no longer in existence, and that during his site visit he determined that the area has been mined out and abandoned. The old haulage road has been removed, and there is an existing road on a bench 40 feet below the area where the accident haulage road had once existed, and he described the existing road as "not in good shape," but

conceded that this was due to the fact that the area has been abandoned and is not maintained. The existing bench area is not a "working area," and he stated that he had an opportunity to generally view the area, including the soil geology and strata during his site visit. Having viewed the site, he believed that the maps introduced during the course of the hearing, exhibit ALJ-1, and the map attached to the accident report, exhibit G-7, appear to be reliable and reasonably accurate insofar as they portray contours, the parameters of the old haulage road, and the location of the pit and spoil piles.

Dr. Wu reviewed photographic exhibit G-4, and he described the area shown in several photographs. He stated that the terrain depicted in photograph #4 behind the individual shown in the photograph is composed of "natural materials," while the area below him is not. He also indicated that he was informed that there was a "heavy rain" on March 5, 1984, the day of the accident, and that "pools of water" were under the spoil pile, but that they were "covered up" with spoil materials. He stated that the areas shown to the right and left side of photograph #5 show evidence of "water seepage and piping." The gray colored materials shown in photograph #7 below the crib block shown on the road is indicative of "clay materials." The area at the top of photograph #8, to the right and below where the individual is standing indicates a "depressed area" immediately below where the two wooden cribs were embedded in the ground, and this indicates to him that rocks and loose materials were "layered" to form that portion of the road. The area behind the crib block lying at the edge of the roadway, as shown in photograph #6, and exhibit C-R-1, indicates a "crack" in the road which pushed out to the edge of the roadway. He identified the depressed areas shown in photographs #9 and #10 (circled in red), as "cracks" in the roadway. The area circled in photograph #23 was identified as a "crack" approximately 40 feet from the roadway (Tr. 1275-1309).

Dr. Wu indicated that it is a general practice to use whatever materials are available at the mine site for roadway construction, and he agreed that the filling in of road depressions with available materials in the normal course of mining is an acceptable practice. However, he indicated that the use of too much "fine" material does not permit proper road drainage (Tr. 1357, 1374).

Dr. Wu conceded that there was no way he could determine whether the entire roadway was suspect at the time of the accident. However, based on all of the information and

evidence made available to him, including the testimony of MSHA's witnesses during the course of the hearings of March 12-14, 1985, he was of the opinion that the haulage road failed due to poor construction and maintenance, lack of proper material selection, and seepage of water under the spoil bank and roadway. With regard to the berms, assuming the inspector's measurements of 14 inches high is correct, and assuming that the berms were constructed of soft, wet materials, he was of the opinion that a driver would not be able to "feel" the berm, and that they were inadequate (Tr. 1358-1383; 1387-1389).

On cross-examination, Dr. Wu conceded that he had never been involved in the actual construction of any haulage roads, and that he has viewed haulage roads a "couple of times" when asked to give his advice (Tr. 1395-1399). His testimony in these proceedings is based on his experience and knowledge in soil and rock mechanics, as well as his experience in investigating mine accidents when called upon to do so (Tr. 1400-1401). He conceded that he did not take the photographs which are in evidence and that he is not a forensic expert in photograph interpretations (Tr. 1402).

Dr. Wu conceded that when he visited the accident site prior to the hearing, there was a change in the configuration of the site, and he described what he observed (Tr. 1405-1408). His observations included flowing muddy material which he considered to be unusual because the weather was dry. However, given the fact that there was recent heavy snowfall, he conceded that the presence of water and muddy materials was not unusual (Tr. 1408-1411).

Dr. Wu testified generally as to problems caused by water and lack of proper roadway compaction, and he did so by reference to the photographs and map which are in evidence in these proceedings (Tr. 1416-1432; 1435-1437). He also testified generally as to the effect of roadway construction materials to the stability of the roadway (Tr. 1445-1449).

Valley Camp's Testimony and Evidence

Franklin L. Simmons testified that he is employed by the Shrewsbury Coal Company, a subsidiary of the Valley Camp Coal Company, as the Manager of Technical Services. He has been in this position for over 3 years, and his present and past duties include supervision over a staff of 25 employees in such areas as mine engineering, construction, maintenance, and supervision over the laboratory. He has also been involved in the formulation and submission of surface mine plans and permits for state and federal approval, and

has also supervised all aspects of surface mines, including the supervision of construction foremen, carpenters and construction personnel.

Mr. Simmons confirmed that his duties also included the supervision of engineers and assistant engineers engaged in the haulage road construction, and he supervised the work necessary to obtain state mining permits for the No. 45 Mine. His education includes a two-year Associate Science degree in drafting and designing from the West Virginia Technical College, and engineering and water quality courses at the University of Charleston and Penn State University.

Mr. Simmons stated that he has been involved in the design and construction of 21 surface and 11 underground mines for the purpose of obtaining mining permits, and that this work included such areas as sediment control, water quality, and geology. He has also been involved in the design of three refuse piles, and he supervised the engineering work that went into the planing of these facilities. He conceded that he is not a professional registered engineer, and that while he has not personally constructed any haulage roads, he has observed them while they were being constructed. During his design and planning duties, he determined where the roads would be placed in order to comply with state requirements concerning sediment controls and the amount of materials placed on the out-slopes.

Mr. Simmons stated that he gave no specific instructions to the foremen who were engaged in the construction of the haulage road in issue in this case. However, he described how the roadway was constructed, and he explained the steps taken to construct the roadway by reference to two graphic charts, exhibits CR-12 and CR-13.

Mr. Simmons confirmed that he was familiar with the scene of the accident and that he traveled that portion of the road several days before the accident. He described the pit floor area just under the first coal seam as shale material, sandstone, and then another coal seam. He confirmed that the procedures and methods used to construct the road in question were also followed in the construction of other roads at the No. 45 Mine (Tr. 1523-1580).

On cross-examination, Mr. Simmons confirmed that he had no registered engineers or surveyors working for him, and that he was Mr. Augustine's supervisor. He confirmed that a "typical" roadway width at the No. 45 Mine was 16 to 17 feet, and that some areas where there was a need to provide a passing lane for vehicles, the widths would range from 20 to

30 feet. He estimated the width of the roadway at the accident scene to be somewhat less than 16 to 18 feet, and he believed that the company expected the roadways to remain 18 feet wide.

Mr. Simmons reiterated that he generally observed the construction of the road in question, and that the map area which is a part of MSHA's investigation report, exhibit G-7, showing the 14 foot, 6 inches to 14 foot 3 inches measurements where the accident occurred is somewhat lower than the other roadway areas. He identified this area as that shown in photograph No. exhibit G-4.

Mr. Simmons confirmed that prior to the accident, he was aware of some slips which had occurred on the roadway, and that Mr. Augustine brought this to his attention. Mr. Simmons agreed that such slips should be watched and taken care of. He also confirmed that approximately 2 weeks before the accident, a berm had slipped, but that it was corrected and replaced. He denied that he was aware of any roadway or berm slips on the day of the accident, and he stated that no one ever brought such conditions to his attention. He was also aware of the presence of water in the pit area but he did not consider this to be an unusual problem (Tr. 1580-1650).

Roy Hanshaw, foreman, Valley Camp No. 45 Mine, testified that he has been employed in this capacity for approximately 5 years, and that prior to this time he worked as a dozer, end loader, and auger operator. He confirmed that he helped construct haulage roads and berms at the No. 45 and 46 Mines, and that his prior experience includes work with Carbon Fuel Coal Company, FMC, and several road construction contractors. He has operated forklifts, 50-ton road rollers, rock crushers, and water trucks during his construction work on interstate highways. While employed with Valley Camp, he estimated that he supervised the construction of 20 miles of haulage roads.

Referring to a sketch of a typical haulage road, exhibit CR-13, Mr. Hanshaw explained the procedures followed in the construction of such a road. After reaching the pit floor, materials are trucked in and dumped and spread by a bulldozer to construct a 4 foot lift, and the bulldozer spreads and compacts the materials. Compaction is also accomplished by the 70-ton loaded trucks as they bring the materials to the roadway. Mr. Hanshaw indicated that "the best materials available" are used to construct the roadway, and that wet materials are not used.

Mr. Hanshaw stated that the actual construction of the roadway in question was done on the evening shift, and that he built part of the road. The roadway width averaged 16 to 25 feet, and it was approximately 1,500 feet long. It was not unusual to have a single lane road at a contour mine such as the No. 45 Mine, and the drivers knew where these areas were located and would wait for loaded trucks to pass them.

Mr. Hanshaw stated that the berm heights at the mine haulage road varied, and that at some switchback and steep turn locations, they were as high as 15 feet. The purpose of the berm is to allow the driver to guide his vehicle onto the roadway.

Mr. Hanshaw stated that he has never experienced any accidents along any haulage roads which he has constructed and he is not aware of any roadway failures on roadways where he has supervised the construction.

Mr. Hanshaw stated that he was familiar with the haulage road where the accident occurred and that he was aware of a berm slip which had appeared in the accident area on February 21 or 22, 1984, before the accident. He explained that he detected slippage in the berm during a preshift examination, but he detected nothing wrong with the roadway surface. Materials were brought in from the high wall and they were used to reconstruct the berm. In addition, the roadway was widened some 6 to 8 feet into the spoil bank.

Mr. Hanshaw stated that after he detected the slip, he "monitored the area," and estimated that the roadway was 15 to 16 feet wide after it had been cut into the spoil. Spoil material was also used to build up the area which had slipped, and it was possible that some shot materials" may have gone over the outslope, but that no fill material was deliberately placed or dumped over the outside slope of the roadway. The berms were also replaced to a height of 4 feet.

Mr. Hanshaw stated that on the day of the accident, March 5, 1984, there were problems with the berm in the area near the pit. While taking loader operator Estep to the pit, rocks came off the spoil bank into the roadway. It had been raining that day and part of the berm on the haulage road near the pit had slipped. He also observed an area at the accident scene which had slipped, and he observed this about 2 p.m. on the day of the accident. He walked along the berm at the accident location to check on the "slide area" and he estimated that the slip which was present on

the out slope extended for a distance of some 40 feet. Had the slip continued, it was his opinion that another roadway would have to be constructed under the area. Mr. Hanshaw believed that the two slip areas which he described were the only ones which existed from approximately February 20 to the day of the accident.

Mr. Hanshaw stated that he preshifted the roadway every morning, that no one ever refused to drive over the roadway, and no one ever complained to him about any hazardous conditions on the haulage road.

Mr. Hanshaw stated that after the accident, he measured the road where the left front tire of the truck slipped sideways, and that from the spoil pile to where the truck cut into the road, the roadway was 14 feet, 6 inches wide. He did not measure any other portions of the roadway. He participated in the rescue operations, and he observed no breaks or faults in the roadway after the accident.

Mr. Hanshaw examined photograph No. 10, exhibit G-4, and he could not state that a "crack" was present in the roadway. He confirmed that he had never observed any such condition shown in the photograph. He also stated that he saw no evidence of any braking by the truck involved in the accident, and he believed that the truck stopped and then slid over the side of the road.

Mr. Hanshaw stated that he helped to supervise the abatement of the order and that materials were removed from the slip area and signs were posted which read "danger, one lane." After abatement, he believed that the roadway looked no different than it did before the accident. He also indicated that MSHA Inspector Wayne Lively and State Inspector Gordon Wiseman advised him to build the roadway closer to the spoil bank and to reconstruct the berm.

Mr. Hanshaw stated that augering was taking place around the haulage road toward the pit area, and that there was some water in the pit prior to the accident. He was not aware of any water flowing from the spoil pile onto the roadway (Tr. 1650-1744).

On cross-examination, Mr. Hanshaw stated that the out-crop is not usually taken out while mining is taking place, and he confirmed that he did not participate in the construction of the original roadway from the pit area to the scene of the accident. He confirmed that the slippage which he observed in February was noted in his preshift report and that the conditions were corrected. He also confirmed that the berm was gone that day, but that this was not a typical

condition and he did not know what actually caused the berm to slip. He stated that he talked to Mr. Pendergrass about the slippage the next day and that he "put a stick in it to watch it."

Mr. Hanshaw stated that after the accident, he did not believe it was safe to drive through the area with the berm gone. He also indicated that when he last saw the berm at 2:00 p.m., on the day of the accident, it was approximately 4 feet high and 6 feet wide at the base.

Mr. Hanshaw confirmed that he was not involved in the original construction of the roadway in question. Although he indicated that the width of a roadway had to be 28 feet in order for the dozer and truck to work side-by-side, he conceded that he had no knowledge that this was the case at the accident location on the day of the accident. He also explained the spoiling methods and the manner in which a roadway is compacted by using trucks and dozers.

Mr. Hanshaw stated that there was a problem with some water which was released from an abandoned mine after an auger drilled into it. This happened on March 19 or 20, and the augering was being conducted some 2,000 feet from the accident area. As far as he knew, there were no water problems caused by augering prior to the time of the accident, but that rainwater did collect in the pit from time to time. He confirmed that there was approximately 1 foot of accumulated rainwater in the pit on the day of the accident, and he indicated that it had accumulated over a period of days. However, it was drained away from the pit area by means of a "french drain," and the roadway portion which was built on top of this drain "is still holding in that area" (Tr. 1782).

Mr. Hanshaw stated that he never observed any water seeping out of the spoil pile in the immediate accident area. He did observe some puddles of water, but these were the result of rainwater. He confirmed that he was aware of berm slippage on the road on February 23, 1984, the day after the road was constructed. He detected the slippage during his preshift examination, and it extended for some 30 feet in length. All of the material under the berm slipped with the berm, and while he considered the condition to be hazardous, it was immediately corrected (Tr. 1795). Mr. Hanshaw could offer no explanation for the slippage, and he indicated that "it's not typical" (Tr. 1796). The condition was corrected by digging into the adjacent spoil bank to widen the road and the berm was replaced. He informed Mr. Pendergrass that the slip would have to be monitored, and that if it continued, an additional roadway might have to be constructed

below the slip area in order to contain it and to stay in compliance with the State Department of Natural Resources regulations (Tr. 1800-1801; 1809-1810).

Mr. Hanshaw stated that the only slippage he was aware of on the morning of the accident was the area around the corner from the accident site. A berm had slipped, and he sent Mr. Estep to repair it and widen the roadway. No one reported any slippage at the immediate accident scene (Tr. 1808). When asked about the testimony of Mr. Saunders and his refusal to drive through the accident area on the day of the accident because the roadway and berm had slipped, Mr. Hanshaw replied that Mr. Saunders "was confused," and that the slippage which he had repaired on March 5, was around the corner from the accident scene. The drivers could not get through because an end loader was working on the roadway (Tr. 1812).

Mr. Hanshaw stated that he first discovered the slippage on March 5, at approximately 7:00 a.m., when he was taking Mr. Estep to his end loader. The slippage was about 80 to 90 feet closer to the pit than where the slippage had occurred on February 23rd (Tr. 1814). He did not note the March 5 slippage on his preshift report, and could not explain why he failed to include it (Tr. 1815). He agreed that the area was not safe to drive through, and no one drove through until the conditions were corrected. Since it was obvious that an end loader was working on the road, and since the repair work took about 15 minutes, he did not specifically advise any of the truck drivers that the road was being repaired (Tr. 1820).

Mr. Hanshaw stated that on both February 23 and March 5, his instructions for the repair work to be done included instructions to widen the roadway by cutting into the spoil bank and replacing the berms which had slipped (Tr. 1822). He confirmed that during the shift change on March 5, he had no opportunity to inform Mr. Maggard about the slippage, but that he had intended to tell him. He did mention the berm slippage to Mr. Pendergrass and informed him that the condition had been corrected (Tr. 1826-1827).

Mr. Hanshaw stated that there was no standardized company policy with respect to the speed limit on the haulage road, and that there were no standardized traffic rules, signals, or warning signs (Tr. 1831; 1833). When asked about the kind of berm he would construct at the immediate scene of the accident, Mr. Hanshaw replied as follows (Tr. 1851-1852):

THE WITNESS: What kind -- well, I built a berm four foot high.

JUDGE KOUTRAS: And why did you build it four foot high?

THE WITNESS: Just about the standard procedures.

JUDGE KOUTRAS: You built it four foot high. Would it surprise you if I was to tell you that MSHA only required it to be 22 inches high?

THE WITNESS: Well, if they did require me to build it 22 inches high, I'd still build it four foot or higher if I could.

JUDGE KOUTRAS: Why would you do that?

THE WITNESS: Give the truck driver more---

JUDGE KOUTRAS: If you built it four foot high or higher, the base would have to be wider, wouldn't it?

THE WITNESS: Yeah. That's right.

JUDGE KOUTRAS: If the base is wider that narrows the road, doesn't it?

THE WITNESS: That's true.

JUDGE KOUTRAS: So, you're doing one thing and you're defeating something else, aren't you?

THE WITNESS: That's true.

In response to further questions, Mr. Hanshaw stated that he was not concerned about the integrity of the roadway from the day it was built on February 21 to March 5, the day of the accident. However, he was concerned about the slip below the roadway and his concern was that it might go beyond the area for which the company had a permit (Tr. 1865). He denied that any berm slippage at the immediate scene of the accident involved any of the useable road, and he also denied that any portion of the roadway was constructed on the outcrop (Tr. 1859, 1965).

Louis Maggard, testified that he is not presently employed, but that he had been previously employed by the respondent as a foreman for approximately 4 years. His prior mining experience includes 9 years as a surface miner, 4 years as a loader and dozer operator, and supervisory experience in connection with the construction of interstate highways. He confirmed that he supervised the construction of the haulage road on February 22, 1984, including the portion which is in issue in this case. Mr. Maggard explained how the road was constructed, and he indicated that when it was first constructed it was 28 feet wide, but after spoiling, the width was down to approximately 16 feet on the day of the accident. Mr. Maggard stated that he had no problems with the roadway after it was constructed, and he conceded that no signs were posted because he did not believe the roadway was narrow. He also indicated that Mr. Hanshaw informed him that the berm had slipped away, and he corrected the condition.

Referring to respondent's sketch, exhibit CR-13, Mr. Maggard explained that the roadway was constructed from rock materials, and that the roadway was built on 4-foot high lifts. Berms were installed at heights of 4 feet along the roadway where the accident occurred, but at other locations, such as "switchbacks," higher berms were constructed. Mr. Maggard was not aware of any water "dammed up" in the area of the roadway, and he observed no hazardous conditions along the roadway on the day of the accident. He conceded that he would not drive through the area after the accident occurred. He believed that both Mr. Hartwell and Mr. Westfall drove past the accident area on many occasions without incident, and he believed that they followed the usual procedures and "rules of the road." On the day of the accident, four trucks were in operation; one loading, one dumping, and two waiting to pass each other on the roadway.

Mr. Maggard stated that he took no measurements of the width of the roadway after the accident, and he confirmed that he observed no slips or fractures in the roadway when he walked it the next day during the recovery operations. After reviewing photograph number one, exhibit G-4, Mr. Maggard stated that the outslope of the roadway may have slipped during the night between the accident and the day of recovery operations.

Mr. Maggard stated that the day shift began abatement by removing a portion of the roadway 15 feet down to the coal seam, and then rebuilding it up in 4 foot lifts. Berms were then added, and signs stating "one lane road" were installed. He was of the opinion that the accident resulted after Mr. Hartwell "got too far over," and that a large rock

which he was hauling shifted in the truck bed and caused the truck to turn over at the edge of the roadway.

Mr. Maggard stated that he had never previously been cited for improper road construction. He confirmed that he and Mr. Nichols did not get along well. He also confirmed that a drill auger was on the mine site on the day of the accident, and that it had been there for about 2 weeks. However, no augering was done in the area of the accident, and it was confined to an area near the pit some 200 feet away. Although Mr. Maggard did see water in the pit on the day of the accident, it was flowing away from the accident area toward the pit floor some 200 feet away. He also indicated that there was one place where the auger did push through to water, but this occurred after the accident, and it was at a location some 500 to 600 feet from the accident site.

Mr. Maggard indicated that the three elements of a properly constructed haulage road include the selection of materials, the location of the materials on the pit floor, and the compaction of the materials as the road is being constructed. He believed that compaction is the most important element because the roadway has to be built on solid materials. He stated that no portion of the roadway in question was built on the outcrop (Tr. 1871-1898).

On cross-examination, Mr. Maggard confirmed that prior to the accident, he served as a mine foreman for approximately 3 years. He confirmed that the road in question had been constructed sometime between February 21 and 23, 1984. He stated that approximately 150 feet of roadway can be constructed during one shift, and he confirmed that the portion of the roadway where the accident occurred was built by his shift on February 22, 1984. He also confirmed that there was some slippage on the roadway the next day, and that part of the berm had fallen away. He had supervised the construction of the berm the day before, and he acknowledged that a berm could slip if the adjacent slope is too steep. He conceded that anytime a berm slips away, a hazardous condition is created. However, he stated that immediate corrective action was taken and Mr. Hanshaw advised him that the slippage of the berm had been taken care of. Since only a part of the outer berm had slipped, Mr. Maggard did not believe it was a problem, and he did not inform the employees of the condition. It was his understanding that the conditions were corrected by taking some materials from the spoil pile and "firming up" the berm that very same day.

Mr. Maggard stated that the original roadway was constructed on a solid rock base across the entire 28 foot

width, and that it was constructed on 4-foot high lifts, with good compaction. Mr. Maggard stated that the terrain does not affect the overall way in which the road is constructed, and he would not consider the area of the accident to be a "hollow area" where any place in the roadway was lower than other place. Mr. Maggard denied that Mr. Popp ever said anything to him about pushing soft materials to the outside edge of the roadway, but that he (Maggard) had warned Mr. Popp about this practice in the past.

Mr. Maggard confirmed that when the roadway was constructed, some water was encountered in a "rider seam" and a "little puddling" was detected. However, large rocks were placed in to allow the water to run off, and he detected no problems with any water after the roadway was completed. He also confirmed that it was normal to take out the coal out-crop when building a road so that there is a flat base. He did not consider the accident scene to be in a "slip area," and he was not aware of any tree movement, nor was he aware that Mr. Hanshaw was monitoring the area.

Mr. Maggard stated that he was not aware of any slippage of the roadway on the day of the accident, and that he observed Mr. Hanshaw in the pit area at approximately 3:15 p.m., and that Mr. Hanshaw never mentioned any berm movement to him at that time. Mr. Maggard stated that during his preshift inspection on March 5, he remained in his truck and noticed no problems with the roadway. After arriving at the accident scene after the accident, he did not observe which portion of the berm was gone because he was more concerned with assisting the accident victim. He did observe that the truck's under carriage or "protection plate" had taken out part of the berm. While he was at the site the next day, he did not observe any evidence of a truck "slide," nor did he observe any cracks or faults in the roadway.

Mr. Maggard stated that he was aware of the fact that an MSHA inspector inspected the roadway after the accident during the abatement process and that he refused to terminate the order. Mr. Maggard believed that a 2-foot berm would be adequate at the place in the roadway where the accident occurred. He confirmed that the accident victim had worked for him for about 2 months as a truck driver and that he never had problems with his driving abilities. Mr. Maggard also confirmed that the day after the accident, he did make a statement that he was not sure whether berms were present at the roadway location where the accident occurred at the time that he conducted his preshift. He

explained that he saw nothing that day which he believed were hazardous conditions or violations (Tr. 2060-2062).

Mr. Maggard stated that he was not present in the pit area when Mr. Hartwell's truck was loaded, and he confirmed that he (Maggard) and Mr. Nichols did not get along well. He stated that Mr. Nichols has a temper, is insubordinate, and does not like to take orders (Tr. 2069). Mr. Maggard stated that in all of his previous work at other mine sites, the haulage roads were constructed no different than the one in question in this case (Tr. 2110).

Carl S. Anderson testified that he is currently laid off from his employment with the Valley Camp Coal Company, but that he previously worked at the No. 45 Mine as a dozer and loader operator for 3 years and that he worked for Mr. Roy Hanshaw. He confirmed that he worked on the haulage roads at the No. 45 mine, and he referred to the charts depicting how haulage roads are generally constructed, exhibits CR-12 and CR-13, and described the construction sequence.

Mr. Anderson stated that he was working the day shift on the day of the accident and was not present at the mine when it occurred. He stated that he traveled the roadway in question on approximately March 1, 1984, and that "he worked the road" that day. He explained that a berm had washed away because of some rainfall and that he rebuilt the berms with some materials which had been trucked in from the pit.

Mr. Anderson identified the area shown in photograph No. 2, exhibit G-4, as the area where he built the berm 3 feet high, and the materials used were dirt, rock and slate. He saw no slips in the area shown in photograph No. 3, exhibit G-4, and he indicated that some of the materials may have fallen over the side of the roadway bank when he was constructing the berm. He identified the material shown in photograph No. 1, exhibit G-4, as some of the materials which may have fallen, and he indicated that the berm would not have been disturbed.

Mr. Anderson stated that the purpose of a berm is to serve as a visual guideline to deter anyone who may be too close to the edge of the road. He described his equipment as a 992-b end loader, and he stated that he has driven into a 3 foot berm with his equipment, and that when he did so, he "could feel it."

Mr. Anderson stated that he observed no cracks or slips on the roadway when he was on it and that he was not aware of any employee safety complaints about any cracks or slips.

He was aware that rock trucks, coal trucks, and loaders had driven over the road and no one ever complained (Tr. 2133-2146).

On cross-examination, Mr. Anderson confirmed that he normally worked in areas other than those near the road in question, but that on or about March 1, 1984, he "worked the road" for about 2 hours constructing a berm. He was not aware of any locations along the haulage road where there was no berm, but that at the location where the accident occurred the berm was "small." He conceded that there was a berm problem in one area along the road where "it was real bad," and that in the area where the truck went off the road, there was a "problem" for a distance of some 60 feet.

Mr. Anderson identified the area shown in photograph No. 6, exhibit G-4, and extending outby to the area in front of the truck shown in photograph No. 2 as the area where the berm was constructed about 3 feet high and 4 feet thick at the base. Two feet of the berm was "probably" located on the road surface itself, and 2 feet was on the bank where he had dumped the material which had been trucked in from the overburden which had been shot some 100 feet away near the pit. He estimated that approximately eight to 10 loader buckets of material had been dumped and used in the roadway area which he worked. Since the area was a narrow place, some of the materials went over the side of the embankment while it was being dumped. No materials were taken from the adjacent spoil pile.

Mr. Anderson stated that he did not participate in the repair of the road after the accident. However, he visited the area the next day with a mechanic to determine what had to be done to recover the truck which had gone off the road. He observed no fractures in the road at the location where the truck left the road.

Mr. Anderson stated that his loader was 13 feet wide and the road was wide enough for him to turn around to work the materials which had been trucked in. He estimated that the roadway was approximately 16 feet wide where he was working on the berm. He indicated that he had also worked on other roadway areas after a heavy rainfall, and that the berms had to be reconstructed (Tr. 2146-2169).

Nathan King testified that he was employed by Valley Camp Coal as a D-9 dozer operator and that he has been so employed since 1979. Prior to this employment, he worked as a dozer operator on construction projects building dams,

freeways, and strip mines. He has also been a heavy equipment construction boss supervising construction work on the Los Angeles freeway, the Massachusetts turnpike, and the Summersville Dam, and that most of his work experience has been as a dozer operator. He has also been directly involved in the construction of many surface coal mine haulage roads similar to the ones at the No. 45 Mine.

Mr. King identified the diagrams depicted in exhibits CR-12 and CR-13, as typical construction methods used in building surface mine haulage roads. He explained that the actual road construction begins after the pit coal is taken and spoiling begins. The road is constructed on a solid rock base or "coal pavement" which generally rests on a sand rock base. Overburden materials are trucked in to the road construction area and then spread out with a dozer in lifts which average 4 feet in thickness depending on the rock materials used. The normal practice is to use the finest and driest overburden materials. No wet materials or dirt are used to construct the roadway lift, and the dozer operator is responsible for compacting the materials. Compaction is accomplished by means of the dozer and the trucks which come in and out to dump the materials. The dozer spreads and compacts the materials as the lift is being constructed. He confirmed that he has rejected materials which are unsuitable for compaction.

Mr. King stated that during the period subsequent to March 4, 1984, he constructed roads at the No. 45 Mine and that the construction procedures were the same as those which he has explained. He confirmed that he returned to work at the mine after a back injury on March 5 or 6, 1984, and worked there until he was laid off. Two days after the accident, he was at the accident scene and helped recover the truck by means of cables fastened to two or three D-9 dozers. He confirmed that he drove a 48-ton dozer with a 16 foot blade through the accident area and around to the spoil pile near the pit to do some work on the spoil pile, and that he had no difficulty in safely doing so.

Mr. King confirmed that after the accident, he worked on the removal of materials from the roadway to assist in the abatement of the order. He identified the area shown in photographs No. 20 and 3, exhibit G-4, as the area on the embankment from which he removed materials with his dozer. He confirmed that he also removed approximately 3 feet of the outer edge of the roadway to achieve abatement, and the materials removed included top soil and the outcrop down to the rock roadway base. In some of the areas, he had to "chisel out" the roadway base materials with the "bit" end of his dozer, and he estimated that he took out materials

over an area of approximately 16 feet at an angle along the embankment adjacent to the road.

Mr. King stated that he noticed nothing unusual about the roadway as he was taking the materials out. He confirmed that Mr. Hanshaw advised him that the berm "had to be re-established." The roadway had been constructed on shale and sandstone and Mr. King saw "no problem" with the road bed when he uncovered the materials. He estimated that he removed materials along an area of some 60 feet from a point beyond where the truck left the road and back toward the pit area. He did not participate in the replacement of any materials, and he observed no cracks or fractures in the roadway when he drove over it. The materials which he removed during the abatement process were not wet or "runny or soupy" materials. He believed that one can "feel" a berm, and that he has done so on several occasions when he backed into a berm with his equipment (Tr. 2169-2221).

On cross-examination, Mr. King reiterated his prior roadway construction experience, and he stated that if the roadway is wide enough, it is desirable to build a berm on the roadway because it is the stronger area. He confirmed that he had not previously travelled the roadway where the accident occurred until 2 days after the accident when he was engaged in the abatement work. He again described the areas where he removed materials during the abatement, and he did so by references to photographs Nos. 2, 3, and 20, exhibit G-4. He also indicated that it was not unusual for the outer slope of the roadway to move (Tr. 2221-2264).

Tom Pomeroy testified that he was laid off by Valley Camp on December 28, 1984, and had previously worked with the company since 1978 operating a 988-B loader, a dozer, and a 50-ton caterpillar rock truck. Prior to this time, he worked for the Princess Susan Coal Company at its contour surface mine, operating a 38-ton Euclid, a D-8 and D-9 dozer, and a rock drill.

Mr. Pomeroy stated that his work experience includes the building of haulage roads at the Valley Camp No. 45 Mine, and he described the procedures he follows in the construction of such roads. He described how the materials are trucked in, dumped, spread out, and compacted into 4 foot lifts. The materials consisted of the shot loose rock from the "side of the hill," and he indicated that as a dozer operator, he has rejected materials as unsuitable. It was not uncommon to construct a berm on the outcrop outer bank of a roadway, nor was it uncommon to have a one-lane roadway at a surface mine. The berms are constructed after the roadway is completed.

Mr. Pomeroy indicated that he drove across the haulage road in question about a week or so before the accident and observed no cracks. He also indicated that he would have noticed if there were no berms present on the roadway. He confirmed that he has made general safety complaints to mine management in the past and that he is not shy in doing so.

Mr. Pomeroy stated that he observed some slippage of materials along the outer bank of the roadway a week or two before the accident, and had also observed slips on other occasions. However, he indicated that these slips never bothered him and he did not believe that they were critical.

Mr. Pomeroy confirmed that he took materials out of the affected areas after the accident during his evening shift which was supervised by Mr. Maggard. He stated that he encountered some water seepage at the outslope coal seam, but he did not believe it was significant. He estimated that he took out material over an area approximately 60 to 70 feet in length along the outslope, and that he replaced it with shot rock materials. He constructed lifts of 4 to 5 and 10 feet on the outslope to reconstruct the roadway during the abatement period, and that a 3 to 4 foot berm was then constructed on the rebuilt roadway.

Mr. Pomeroy estimated the width of the roadway at the location of the accident; both before and after that incident, to be 15 to 16 feet, and he observed no cracks or slips on the roadway base after the accident. He described certain tire tracks which he observed at the accident scene, including an area where the truck left the road. He believed that the material at that location had been taken out by the "belly pan" of the truck as it left the roadway (Tr. 2264-2307).

On cross-examination, Mr. Pomeroy identified a "slip" in the area shown below the line drawn on photograph No. 3, exhibit G-4, and he stated that he was not aware of any problems on the roadway during the morning shift on the day of the accident. He arrived at the accident scene some 45 minutes after the accident and assisted in the recovery operations.

Mr. Pomeroy stated that he observed some trees which appeared to be slipping in an area not shown on the photographs below the outslope of the roadway, and that he had reported this to Mr. Hanshaw and Mr. Maggard a couple of weeks before the accident. He confirmed that Mr. Maggard instructed him as to what had to be done to reconstruct the roadway during the abatement period (Tr. 2307-2368).

Ireland Sutton testified that he has been the safety director at Valley Camp since 1978, and prior to that, worked as the training director. He testified as to his prior experience and indicated that he had a degree from the West Virginia Institute of Technology. He confirmed that he participated in MSHA's accident investigation, and that he also conducted his own. He arrived at the scene 45 minutes after the accident and explained what he did (Tr. 2368-2372). He stated that he heard no one ask any questions as to how the roadway in question was constructed (Tr. 2373, 2374).

Mr. Sutton confirmed that all of the citations and the order which were issued after the investigation were served on him. It was his understanding from MSHA that the decision was made to remove the outer slope area of the roadway "down to solid" and to rehabilitate it "back to its normal condition" (Tr. 2376). He also stated that at no time was he ever advised as to what practices he should employ in the construction of haulage roads (Tr. 2376). He confirmed that he has observed the construction of haulage roads and would trust the opinions of Mr. Hanshaw, Mr. Maggard, Mr. King, and Mr. Pomeroy as to how they should be constructed (Tr. 2377).

Mr. Sutton stated that after the cited conditions were corrected, Mr. Pendergrass advised him that he would contact MSHA to come to the mine on Saturday to abate the violations. However, he later learned that one of the outer berms had slipped or sloughed off and that Inspector Lively would not terminate the violations (Tr. 2379). He examined photographic exhibit G-5, and stated that the photographs accurately depicted the accident area the day after the accident when he was there, but that he did not observe the conditions shown in photograph No. 1 on the day of the accident (Tr. 2381).

On cross-examination, Mr. Sutton confirmed that Valley Camp does not have a formal training course concerning the construction of a haulage road. However, the foremen and the superintendent do communicate with the men in this regard, and the foremen should know what to look for when they examine haulage roads since this is part of their annual retraining (Tr. 2389-2391).

With regard to the abatement process, Mr. Sutton stated that the instructions he received were "vague," and he was simply told that the area would have to be rehabilitated and the loose unconsolidated material would have to be removed (Tr. 2396). He was not present when Inspector Lively came to the mine on Saturday to abate the violations, and it was

his understanding that the berm which Mr. Lively was concerned about had cracked along the outer edge and showed signs of sloughing or sliding (Tr. 2397).

Mr. Sutton stated that prior to the accident, he had traveled the roadway almost daily. While he was not aware of any slip on the morning of the accident, he was aware of the berm which had slipped earlier, and he confirmed that Mr. Hanshaw told him about it (Tr. 2401-2402).

Frank Simmons was recalled by Valley Camp, and he testified that based on his familiarity with mine planning, design, and permitting, he is familiar with the geology of the area which is being mined. He also learned the geology of the mine through core drilling, prospecting, and soil sampling and analysis. He confirmed the presence of an underground mine No. 36 in the Coalburg Seam which is in the area of the No. 45 surface mine, and he located the mines by reference to a mine map (Exhibit CR-14).

Mr. Simmons stated that the No. 36 underground mine is inside a hill directly across from the Number 45 surface mine, but at the same approximate level as the scene of the accident. He indicated that the coal pavement dipped from the accident area towards the pit, but that the roadway surface was relatively level. The auger in question was put in during the last part of February, 1984, and was located toward the pit and out of sight of photographic exhibit CR-1. The augering operation struck water approximately 600 to 700 feet from the accident area, and this occurred approximately March 19, after the accident. Prior to this time, he received no reports of any water problems resulting from the augering operation. In his opinion, the augering operations had no effect on the scene of the accident (Tr. 2434-2448).

Mr. Simmons confirmed that he was aware of a slip which occurred on February 22 or 23 in the accident area, and that Mr. Augustine told him about it. Mr. Simmons also confirmed that he was aware of other slips on the mine haulage roads, and he stated that these were common occurrences. He explained that the inside or outside cut of the roads are subject to rain, freezes, and thaws and if the roadway is on the soil, rather than rock, slips will occur. However, he was not concerned about the slips reported by Mr. Augustine because the mine haul road surfaces are built on the coal pavement which is composed of solid material (Tr. 2455-2456).

Mr. Simmons stated that he travelled the haul road in question and saw no evidence of slippage, cracks, or fractures, and he received no complaints from any of the truck

drivers who used the roadway (Tr. 2457). He agreed with the work done by Mr. Hanshaw to correct the slippage which was reported to him, and in Mr. Simmons' opinion, he would not have dug up the roadway and rebuilt it because there were no fractures or anything to reflect a problem on the immediate road surface (Tr. 2458). He further explained his answer as follows (Tr. 2459-2460):

JUDGE KOUTRAS: This is over the berm and down the slope and on the slope of the out-crop, down on the embankment. What if you saw cracks and fractures there? Would that concern you?

THE WITNESS: Down below the roadway?

JUDGE KOUTRAS: Yes.

THE WITNESS: It would -- not necessarily. When you say "concern," you mean would you be alarmed? Not necessarily alarmed, but you should pay attention to it, yes, sir.

JUDGE KOUTRAS: How long do you pay attention to it -- would you pay attention to it?

THE WITNESS: Well, in -- as long as you're using the roadway.

JUDGE KOUTRAS: Uh-huh. And what would you be looking for?

THE WITNESS: To see if there's any additional slippage or if it's going to cause the integrity of the -- you know, jeopardy of the integrity of the roadway.

When asked about his opinion as to what caused the slip which occurred on the outslope of the road bank on February 23, Mr. Simmons replied as follows (Tr. 2462-2463):

A. Well, there's, I think, several factors, some of which everybody else has stated. One thing that has not been stated was that there was a prospect road down below there in the Winifred Seam.

Okay, having that undercut some of this material, and with some of the testimony that some of the people saw water when they got down to 15 or 16 feet below the roadway, that

freezing and thawing and heavy rains -- you know, there's so many things that could contribute to the slip -- lots of things.

Q. And am I hearing you tell me that it was a combination of things, in your opinion, including the prospect road, the water out of the coal seam that was several feet below the road base, and the weather conditions and the heavy rain?

A. I'm saying they are all a possibility, and without testing, you don't know. You do not know.

Q. Now, about this water coming out of the coal seam that there's been testimony on. You've heard that testimony, is that correct?

A. Yes, ma'am.

Q. Mr. Simmons, in your opinion, did that water in any way effect the stability of the roadway in this case?

A. No, ma'am, not the roadway at all.

Q. Why do you say that?

A. Well, because it was coming out of strata, solid rock and coal, one or the other, below there, and there was sandstone above, shale above that, that was hard, solid material, as -- which has been discussed in prior testimony.

Q. And that material was between the coal seam -- the small coal seam and the road base, is that correct -- and the roadway?

A. Yes, ma'am.

Mr. Simmons stated that he traveled the roadway at the accident scene on March 5, shortly after the accident occurred, and that he observed no cracks, breaks, or fractures in the roadway surface. He observed the right rear tire trucks and believed that the victim was simply not paying attention (Tr. 2464-2465). He testified further as to his opinions and interpretations concerning certain photographic exhibits, as well as the maps included as part of MSHA's accident report (Tr. 2465-2469).

Mr. Simmons stated that prior to the accident, the width of the roadway at the accident location was approximately 15 to 16 feet (Tr. 2469). He also believed that the left front truck tire was off the roadway, and that the truck traveled for some distance in the berm. This area was sufficient to support the truck "until the angle of the truck out over the edge of the truck (sic) exceeded what it could withstand" (Tr. 2470, 2472).

On cross-examination, Mr. Simmons was of the opinion that the accident victim would have traveled on the berm for a distance of 70 feet, and that it would have taken him 10 seconds to travel this distance at a speed of 5 miles an hour (Tr. 2488). Mr. Simmons confirmed that he was at the accident scene for approximately 15 to 20 minutes, and he testified further as to his observations concerning the tire tracks (Tr. 2492-2494). He was asked about his "concerns" regarding road outslope slippage, and he responded as follows (Tr. 2499, 2501):

JUDGE KOUTRAS: Let me just ask the question a different way. Assuming that someone came to you, prior to the accident, and said over a period of three weeks and said we had 30 foot of berm slip or slide in one area, we had 60 feet slip or slide at the immediate area, and we had another 30 feet slip or slide right there -- and by the way, after we abated it, we had a crack in the berm and MSHA wouldn't abate it. Assuming that you were aware of all these things that I've just told you, would that concern you?

THE WITNESS: Yes, sir, it would.

JUDGE KOUTRAS: Why would it concern you?

THE WITNESS: Because it would -- there was some instability on the outside -- on the outslope.

* * * * *

BY MS. GISMONDI:

Q. Mr. Simmons, the facts that the Judge asked you to assume, would they concern you with respect to the stability of the roadway?

A. Yes, ma'am.

When asked about the "slip" which appears to be depicted in photographic exhibit No. 1, G-4, Mr. Simmons responded as follows (Tr. 2504-2506):

JUDGE KOUTRAS: Now, Mr. Simmons, I'm going to ask you if -- if you were driving along the haulage road and you saw these conditions, would that concern you?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Why?

THE WITNESS: Because it's in the close proximity of the roadway.

JUDGE KOUTRAS: And how would you characterize these conditions?

THE WITNESS: Well, that is a slip.

JUDGE KOUTRAS: Which is a slip?

THE WITNESS: Right here below this fill.
(Indicating.)

* * * * *

JUDGE KOUTRAS: Okay, and what would you do about it?

THE WITNESS: Well, in this particular case, I would get a hold of Mr. Hanshaw and let's see what we can -- you know, move the road to the inside, build the berm back on the solid.

Wayne Lively, MSHA Surface Mine Inspector, testified as to his background and experience, and he confirmed that he has been an inspector since July, 1977. He worked in the mining industry for about 5 years before he was an inspector, and he has operated coal trucks, haulers, loaders, dozer, and augers. His present work includes the regular inspection of haulage roads on surface mining facilities, and he has received regular MSHA-training as a coal mine inspector, including on the job training. His formal training with regard to haulage roads is from reviewing books and materials on that subject.

Mr. Lively confirmed that he visited the No. 45 Mine on Saturday, March 10, 1984, and he did so to abate the imminent danger order. He stated that his supervisor telephoned him the evening before and instructed him to go to the mine and abate the order which had been issued on the haulage road. His supervisor advised him that someone from Valley Camp had called to advise that the haulage road conditions cited in the order had been corrected.

Mr. Lively stated that upon arriving at the mine at approximately 7:00 a.m., he met with Foreman Roy Hanshaw, mine superintendent Zeb Pendergrass, State Mine Inspector Gordon Wiseman, a UMWA safety committeeman, and several others. Mr. Lively stated that the accident area looked different than the way it is shown in the photographs, exhibit G-4, and he explained that this was because the berm along the haulage road had been reconstructed.

Mr. Lively stated that when he arrived at the haulage road, he was shown the location where the truck had gone over the road. Upon inspection of the area, Mr. Lively observed a crack in the roadway approximately 2 to 6 inches wide and extending for approximately 30 feet in the roadway. The crack then extended into the berm at the outer edge of the roadway and was visible for the entire length of the top of the berm. The crack at the top of the berm ranged from 2 to 6 inches in width and extended the entire length of the berm, for approximately 150 feet.

Mr. Lively viewed photograph No. 3, exhibit G-4, and he stated that the crack in the road and berm began at the approximate location of the crib block shown in the photograph, and extended out to the top of the photograph toward the curve in the roadway in the direction of the pit.

Mr. Lively stated that the ground conditions at the haulage road were frozen, and it was his opinion that had the ground thawed, the crack might have worsened and continued. Under these circumstances, he advised Mr. Hanshaw and Mr. Pendergrass that he could not terminate the order. Mr. Lively believed that the crack was "one continuous crack," and he believed that it was the result of the berm and roadway being constructed on unstable ground.

Mr. Lively stated that he made certain recommendations to Mr. Hanshaw as to how to correct the conditions, and that Mr. Pendergrass advised him that he would contact MSHA again when the roadway was ready so that the order could be abated. Mr. Lively stated that he was at the mine for approximately 2-1/2 hours.

On cross-examination, Mr. Lively reiterated his observations of the crack in the roadway and berm, and he confirmed that he made brief notes of his observations. He stated that the berm which had been reconstructed was approximately "waist high" or 3-1/2 to 4 feet in height. Since it had cracked while the ground was frozen, he believed that the crack resulted from movement of the ground and that it would continue to crack once the ground thawed. Mr. Lively stated that the berm was constructed of overburden materials with rocks mixed in, but that most of the berm consisted of "yellow clay" material. He conceded that he had observed berms of similar construction at other surface mines, and apart from the crack which he observed, he had no problem with the berm.

Mr. Lively stated that he gave no specific instructions to Mr. Hanshaw or Mr. Pendergrass as to how to correct the crack in the berm, but he did suggest or recommend that the haulage road be relocated to the top of the spoil bank or that it be widened by cutting into the spoil bank. Mr. Hanshaw and Mr. Pendergrass "ruled out" these suggestions and said nothing further to him. Mr. Lively believed that the haulage road had been constructed on unstable ground.

Mr. Lively stated that when he was at the haulage road, he looked over the embankment and observed evidence of frozen dirt material sloughing on the outside bank. He also identified the "tree line" shown at the base of the hill in photograph No. 3, exhibit G-4, and stated that he also observed this while at the haulage road.

In response to further questions, Mr. Lively stated that he had not previously observed the haulage road prior to the time he visited the mine on March 10, 1984. He confirmed that he was aware that an accident had occurred, but that he did not discuss his observations of the cracks he observed with Inspector Grose or with Inspector Slaughter. He also confirmed that after Mr. Slaughter abated the order the following Monday, March 12, 1984, he did not discuss the matter further with Mr. Slaughter and had no knowledge as to how the cracks in the roadway or berm were corrected to achieve abatement.

Steve Popp, testified that he has been laid off from his job at the No. 45 Mine since January, 1985, and that prior to this, he worked at the mine for approximately 1 year and 3 months as a dozer operator. His prior experience includes the operation of a track loader and end loader doing reclamation work for about 1-1/2 years, and as a back

hoe and loader operator on Interstate I-64 for about 3 years.

Mr. Popp stated that he worked the evening shift with accident victim Bruce Hartwell during March, 1984, and that he was aware of the accident which occurred on March 5. Mr. Popp stated that he was aware of certain problems in the accident area prior to the day of the accident and that he could see dirt and other materials over the hill, and could hear the tree timbers "cracking." He believed that this was caused by the movement of dirt against the trees.

Mr. Popp reviewed photograph Nos. 2 and 3, exhibit G-4, and stated that approximately a week or so before the accident, he observed the slip conditions which appear in the photographs, and he specifically identified the material below the "black line" drawn on photograph No. 3 as a slip.

Mr. Popp indicated that the truck drivers on his shift knew about these slip conditions because "they had to drive through the area" and that it was a topic of discussion. He also stated that he spoke with Mr. Hanshaw about these conditions and that Mr. Hanshaw walked through the area and told him that "it was not working that much." Mr. Popp could not specifically recall when he spoke with Mr. Hanshaw, but confirmed that it was sometime before the accident occurred. Mr. Popp had no personal knowledge that foreman Maggard was aware of these conditions.

Mr. Popp stated that approximately 2 to 3 days, or a week before the accident, he did some work in the slip area, and that this work was an attempt to fill in and over the slip area. He stated further that this work took place in the area starting where the two individuals are shown in photographic exhibit CR-1, that approximately 500 to 1,000 tons of materials were trucked in to do this work, and that Mr. Maggard assigned him to do this work.

Mr. Popp stated that he reported for work at approximately 4:00 p.m. the day of the accident, and that prior to the accident, he observed that the slip over the hill or the embankment was still visible. While there was some material approximately a foot high at the edge of the roadway where the truck went over, he did not consider this to be a berm. He also indicated that there were daily maintenance problems with the berm at the location where the truck went over the hill and that this was true during the period before the accident and on the day of the accident.

Mr. Popp stated that after the accident, he worked on the haulage road removing materials to achieve abatement of

the order. Materials were removed "from the outside slip down to solid ground" and a V-ditch was constructed with a core-rock base in order to allow water to drain off. He indicated that after the materials were removed, the area was back-filled with 2 foot lifts in the slip area and then "stepped" in a manner to reconstruct the slip area to the level of the original roadway. Mr. Popp indicated that part of this abatement work was accomplished during the day shift by Mr. King, and that the evening shift would continue the work where the day shift left off. He estimated that he worked two shifts to complete his portion of the work.

Mr. Popp sketched a diagram, exhibit G-15, and explained how he "stepped" the slope area during the abatement process. He indicated that when he began his work on this abatement, he took out the first 5 feet of material down to solid rock, and then proceeded to "step-out" to the next location for another 5 foot depth to solid rock, and then repeated the process down to solid material.

Mr. Popp stated that during his abatement work, approximately 2 to 3 feet of the outer edge of the roadway surface itself was removed. In his opinion, the width of what was left of the roadway surface after the accident and during the abatement at that location was approximately 8 feet. He also indicated that he trammed his dozer through the area by driving on a portion of the spoil bank. He indicated that he could have driven a dozer with a 16 foot blade and a 12 foot wheel base through the accident location, but that he would have had to drive on a portion of the spoil bank to do so.

Mr. Popp confirmed that he participated in the rescue operations after the accident, and in his opinion, the accident resulted from a failure of the roadway in that the edge of the roadway and the berm "gave out."

Mr. Popp stated that while he was reconstructing the slip area during the abatement, he encountered some water at both of the coal seams below the roadway level. He confirmed that he did not build the original roadway, but that the portion which he reconstructed during the abatement was constructed of good rocky materials.

On cross-examination, Mr. Popp confirmed that he observed the slipping and cracking tree line while traveling the haulageway. He stated that he had repaired different portions of the haulage road and that Mr. Maggard instructed him to do so as required. Mr. Popp stated that as the dozer operator doing the repair work a week or so before the accident, he directed the trucks where to dump the materials.

Mr. Popp then pushed the materials over the slope with his dozer where he was to construct the berm, but that "it wasn't working out." He explained that the materials could not be stabilized, and after his work shift ended, he went home and said nothing to Mr. Maggard about the situation. Later, 1 to 3 days before the accident, Mr. Popp was at the roadway and he observed that the materials had slipped, but he did not report the situation to anyone because he believed that the foreman could see the conditions.

Mr. Popp stated that he was satisfied with the work performed to abate the order and that he was confident that the berm and roadway which had failed had been reconstructed on a solid base and that the materials used were adequate to stabilize the slip conditions.

Mr. Popp confirmed that he was not contacted by MSHA during the investigation of the accident. He stated that he was contacted 2 days before he testified in this case by a UMWA representative and was asked about his knowledge of the haulage road construction. He also confirmed that Valley Camp's safety director Sutton also contacted him, but that he would not speak with him about the matter without the benefit of counsel. Mr. Popp asserted that he harbored no grudge against Valley Camp and that he had not discussed his testimony with the UMWA representative who contacted him.

Inspector Grose was called in rebuttal and testified that he did not instruct Mr. Augustine to take measurements from the outside tire tracks to outside tire tracks which were on the roadway. He confirmed that he did not specifically instruct Valley Camp officials as to how to go about abating the conditions he cited because this would be contrary to MSHA policy. He stated that when he walked the out slope area during his investigation, on March 6, the ground was soft. It was his opinion that day that the berms were inadequate, and after walking the edge of the roadway and the berm area, he was of the opinion that the roadway construction was inadequate in that it was constructed on loose unconsolidated materials. He estimated that the berms ranged in height from 12 to 24 inches, and he did not believe they were adequate to restrain a vehicle.

Mr. Grose stated that constructing a berm on out crop or out slope material rather than on a roadway surface, is not a per se violation of section 77.1605(k), and that it would depend on whether the ground under the berm is stable or not. He also stated that his report does not contain any information about the presence of any water, or that water undermined the surface of the roadway because he did not believe that this was the most important factor which may

have contributed to the failure of the roadway. He also confirmed that his concern about the stability of the roadway was with respect to the outer edge of the actual surface of the roadway and the berm which had been constructed on the bank, rather than the entire width of the roadway.

On cross-examination, Mr. Grose confirmed that he could not recall specifically asking anyone about how the roadway in question was originally constructed. He also stated that the width of the roadway after abatement was 14 to 16 feet and that the berm was constructed of clay material and rock. He also believed that roadway construction after abatement was "better."

Dr. Wu testified in rebuttal that a mine operator should be able to control the amount of spoil he will produce and that he should consider the desired widths of any haulage roads during the initial planning stages of any surface mining which is to take place. He did not believe that the slip conditions shown in photographs 1 and 3, exhibit G-4, resulted from rainfall during the period between the accident and the next day when the photographs were taken.

Dr. Wu was of the opinion that the work done by Mr. Popp on the berm and road compounded the problem with the slip conditions which were present in the area where he was working and that this work was simply a "superficial dressing" for an area which had evidence of ground movement. Dr. Wu also believed that water is always a problem at any mine, but that the presence of any water at the accident location in this case had a limited affect on the roadway. However, if water is present, it must be disposed of, and if not, it will in time impact on a haulage road. Dr. Wu was also of the opinion that given the signs and warnings of ground movement along the haulage road in question, the operator should have paid closer attention to address those conditions.

On cross-examination, Dr. Wu stated that in his opinion the spoiling method used by the operator contributed to the existence of narrow portions along the haulage road. He also conceded that a variety of factors contributed to ground movement in the area of the haulage road.

Mr. Hanshaw was called in rebuttal by Valley Camp, and he stated that he monitored the slip condition in the area of the accident where Mr. Westfall's truck was parked, and that on February 22, a stick was placed along the out slope in that area so that the slip could be observed and monitored.

Mr. Hanshaw stated that he had no knowledge of the work performed by Mr. Popp and he explained that Mr. Popp worked the evening shift and that it was possible that his work was performed as described, but that he (Hanshaw) had no knowledge of it.

Findings and Conclusions

Docket No. WEVA 84-169-R

In this case Valley Camp is charged with a violation of mandatory safety standard 30 C.F.R. § 77.1605(k), for inadequate berms along the outer bank of the haulage roadway. The allegation is that loose, unconsolidated earth spoil material was used to construct the berms and that they were not adequate to restrain the heavy equipment using the roadway. The cited standard reads as follows: "Berms or guards shall be provided on the outer bank of elevated roadways."

The term "berm" is defined in 30 C.F.R. § 77.2(d) as "a pile or mound of material capable of restraining a vehicle." In *Secretary of Labor v. United States Steel Corporation*, 5 FMSHRC 3, 6, January 27, 1983, the Commission noted as follows:

"Restraining a vehicle" does not mean, as U.S. Steel suggests, absolute prevention of overtravel by all vehicles under all circumstances. Given the heavy weights and large sizes of many mine vehicles, that would probably be an unattainable regulatory goal. Rather, the standard requires reasonable control and guidance of vehicular motion.

And, at 5 FMSHRC 5:

We hold that the adequacy of a berm or guard under section 77.1605(k) is to be measured against the standard of whether the berm or guard is one a reasonably prudent person familiar with all the facts, including those peculiar to the mining industry, would have constructed to provide the protection intended by the standard.

* * * * *

Under our interpretation of the standard, the adequacy of an operator's berms or guards should thus be evaluated in each case

by reference to an objective standard of a reasonably prudent person familiar with the mining industry and in the context of the preventive purpose of the statute. When alleging a violation of the standard, the Secretary is required to present evidence showing that the operator's berms or guards do not measure up to the kind that a reasonably prudent person would provide under the circumstances. This evidence could include accepted safety standards in the field of road construction, considerations unique to the mining industry, and the circumstances at the operator's mine. Various construction factors could bear upon what a reasonable person would do, such as the condition of the roadway in issue, the roadway's elevation and angle of incline, and the amount, type, and size of traffic using the roadway.

Truck driver James Westfall, the only eyewitness to the accident, testified that the truck which left the roadway appeared to be "on or close to" the berm at the edge of the outer bank of the roadway for a distance of approximately 40 feet and that it "took out" the berm as it went over the edge. The estimated speed of the truck was 5 to 10 miles an hour, and there is no indication of any mechanical defects. As described by Mr. Westfall, the truck appeared to turn over "in slow motion" as it began to go over the edge of the roadway. Thus, it would appear that any existing berm was inadequate to restrain or otherwise physically prevent the truck from leaving the roadway. The test to be applied in determining whether a violation has been established is whether or not MSHA has established by a preponderance of the evidence that the berm which the inspector alleges was constructed of loose, unconsolidated earth spoil material was the kind which a reasonably prudent person would provide under the roadway conditions which existed at the time of the accident.

There is a difference of opinion as to what constituted an adequate berm height along the roadway in question. Inspector Grose believed that the berm should have been constructed on a wide base, and at heights of 6 to 8 feet. Inspector Slaughter stated that after abatement, the berms appeared to have been constructed on a 3-foot base, and at heights ranging from 3 to 4 feet. Since he abated the order, I assume that Inspector Slaughter would agree that a 3 to 4 foot high berm was adequate.

Loader operator Estep testified that the height of the berm would depend on the width of the available roadway, and he was of the view that in light of the narrow roadway, MSHA's mid-axle height guideline was difficult to achieve. He stated that the berm was originally constructed to a height of 2 feet, but that after it was replaced when the roadway slippage occurred, it was constructed to a height of 3 to 4 feet. He believed that the purpose of the berm is to alert a driver that he is "over too far," and he would construct a berm 4-1/2 feet high on a 6 foot wide base so that the truck driver could see it. He also indicated that in his experience at the mine, the berms were always constructed at a height halfway up the axle of the largest piece of equipment using the roadway, and this would be 3-1/2 feet high, the mid-axle height of a 988 end loader.

Loader operator Nichols testified that while he was aware of MSHA's mid-axle high policy, he usually constructed the berms at heights ranging from 4-1/2 to 5-1/2 feet high, and he did so because that had been his practice at other mines. He also indicated that he constructed the berms by "dumping and piling spoil materials" with his end loader.

Foreman Maggard was of the opinion that a 2 foot berm would have been adequate at the roadway location where the accident occurred, and he confirmed that when the berm was replaced after it had slipped the day after construction was completed, it was simply "firmed up" with materials taken from the spoil pile.

Dr. Wu testified that assuming Inspector Grose's measurements of a 14-inch berm are correct, he was of the opinion that a truck driver would not be able to "feel" the berm, and that it would therefore be inadequate.

Mr. Saunders, Mr. Estep, and Foremen Hanshaw and Maggard all agreed that a berm should be constructed high enough so as to alert a driver that he is close to the edge of the road. They all agreed that a driver should be able to visually observe the berm so that he may "guide" his vehicle away from it. Further, both Mr. Maggard and Mr. Hanshaw confirmed that at some areas at the mine where there are curves or "switchbacks" in the roadway, the berms are constructed larger than 4 feet high, and Mr. Hanshaw stated that he has seen them as high as 10 to 15 feet (Tr. 983-984; 1135; 1682-1683; 1887-1889).

The record in this case establishes that from the day construction was completed on the roadway, and for an approximate 2-week period after that, problems were encountered with berms slipping or subsiding along the roadway.

Mr. Estep, Mr. Simmons, Mr. Hanshaw, and Mr. Maggard all confirmed that the day after construction was completed, the berm slipped off the edge of the roadway for a distance of approximately 30 to 40 feet. Although the berm was immediately reconstructed, additional slippage continued. Mr. Popp testified that there were daily maintenance problems with the berm at the location where the truck went over the hill both before and after the accident. Mr. Anderson testified that 3 or 4 days before the accident a berm had been washed away by rain, but that he replaced it with materials trucked in from the pit. He also testified that the berm at the accident location was "small," that there was a berm problem in one area along the roadway where "it was real bad," and that at the accident location there was a "problem" for a distance of some 60 feet.

Mr. Estep testified that on the day of the accident and prior to that incident, the berm at the immediate accident location had slipped about 3 or 4 feet, and he described it as "completely gone." Mr. Nichol's viewed that same area shortly before the accident, and he stated that the berm had slipped or subsided to a point where it was only 6 to 8 inches high. Mr. Popp also view that same area, and while he observed "material" approximately 24 inches high along the edge of the roadway, he did not consider this to be a berm. Although Mr. Hanshaw testified that when he last observed the berm along the roadway at approximately 2:00 p.m., the day of the accident it appeared to be 4 feet high and 6 feet wide at the base. He also stated that he observed some slippage at the accident location for a distance of some 40 feet. He also confirmed that he was aware of some berm slippage around the corner from the accident scene, and that he dispatched Mr. Estep to that area to repair the berm.

Inspector Slaughter noted differences in the composition of the berms on the day of the investigation, as well as several days later after abatement was achieved. He testified that the berm on March 6th was "a soft dirt-type berm, which was saturated" but that on March 12th, the berm "was a blue-type material which indicates shale and rock and a solid-type material. The berm on the 12th also appeared to be higher and wider and "a more firm berm" (Tr. 479-480).

Inspector Grose testified that he measured the axle height of the haulage truck which ran off the road and determined that the vertical distance from the road to the mid-axle was 22 inches. He measured the existing berm heights along portions of the roadway, and found that they were 24, 14, and 18 inches high. The 14 and 18 inch berm heights were at the location where the truck left the road.

Referring to his notes which were made at the time of his investigation, Mr. Grose indicated that the berm was "constructed of soft earth-inadequate to retain vehicles-stepped on berm and foot submerged" (Tr. 96, exhibit G-8). He testified that upon visual observation, the berm was constructed of "earth-type spoil material" and was "just a unit of mud and water" (Tr. 113). He also indicated that the "very soft earth" berm materials were not compacted, and that without some "additional materials or elements in it, it's hard to compact this type of material" (Tr. 135). The "additional materials" would have been "more rock than earth" as were used in the abatement of the citation (Tr. 136).

Inspector Grose testified that one of the factors which influenced his decision to issue the citation was the fact that the berm heights at the roadway location where the truck left the road were not at least 22 inches as specified in MSHA's "mid-axle height" policy guidelines (Tr. 113-114). Additional factors which influenced his decision are reflected in the following testimony (Tr. 114-115):

BY MS. GISMONDI:

Q. Just limiting ourselves to this particular vehicle, Mr. Grose, if this berm had been 24 inches throughout the entire area, but none of the other conditions were changed, it was still made of the same material and the rest of the conditions remained the same, would you have considered that to be adequate?

A. No.

Q. Okay, And why not?

A. He couldn't use it as a site guide to see where he was in relation to the edge of the roadway, and it would not be stable enough to give him any indication that he had hit the berm if, in fact, a tire would hit a berm.

If it was a berm, and the tire would hit it, he wouldn't know he hit it. This soft material -- a 65-ton -- you wouldn't know if you was hitting the berm, if you was in the berm. It would have no means to retain or deflect or warn the driver that he was near the edge of a road.

Q. Okay, so would I be correct in understanding that your concern with this berm was not limited to the height of the berm?

A. No. I have to consider it, but there's several factors I consider besides the fact of the height.

Q. Okay. Well, what else do you consider besides the height when you try to determine the adequacy of a berm?

A. Two of the main things I consider is if the operators of the equipment can see it. Is it of such a configuration and design that the operators can see it within a normal distance of where they are in relation to their vehicle?

Another thing I consider is the ability of the berm to help retain or deflect a vehicle back to the roadway in the event it should slide. While going parallel, if it should slide over against the berm, the ability of the berm to deflect the vehicle back to the roadway.

Although Mr. Augustine stated that he observed the berm sometime prior to the accident and that it was approximately 19 to 31 inches high, he did not view it on the day of the accident or at anytime immediately before that event. With regard to the testimony of Mr. Anderson that the berm was 3 feet high when he worked on it, the fact is that he worked on it several days prior to the accident and had no opportunity to view it on the day of the accident or at anytime immediately before the event. As for the testimony of Mr. Hanshaw that the berm at the accident location was approximately 4 feet high when he viewed it at approximately 2:00 p.m., or approximately 2 hours before the accident, I give more credence to the testimony of Mr. Estep and Mr. Nichols that it was substantially less than that claimed by Mr. Hanshaw.

In its posthearing brief, Valley Camp's counsel argues that Inspector Grose's observations the day after the accident are not representative of the construction of the berm prior to the accident due to overnight heavy rainfall, the disturbance caused by the truck travelling over the bank, and the subsequent rescue efforts. Counsel concludes that the construction of the berm prior to the accident was consistent with what a reasonable person familiar with the situation would construct in the area of the accident.

I have carefully reviewed the record in this case, and while Valley Camp presented detailed testimony as to the methods and procedures used in the construction of the roadway, I find very little to rebut Inspector's Grose's testimony as to the condition of the berm. As a matter of fact, Mr. Hanshaw testified that the berm is constructed as the road is being constructed by simply dumping and leaving materials on the roadway to be shoved out by the dozer to form a berm. When asked whether the materials are compacted, he replied "some of it is and some of it's not" (Tr. 1674). Mr. Nichols testified that he constructed berms by simply dumping and piling spoil material with his end loader, and Mr. Maggard indicated that the berm which had slipped a week or so before the accident was reconstructed by "firming it up" with materials taken from the adjacent spoil pile.

After careful consideration of all of the testimony and evidence adduced in this case, I conclude that MSHA has established a violation by a preponderance of the evidence. Although I have considered the fact that part of the berm was taken out by the truck when it left the roadway I find the testimony of Mr. Estep, Mr. Nichols, and Inspector Grose to be credible, and it supports a conclusion that prior to the accident, the berm along the roadway in the area where the truck went off the edge was at most 18 inches high. I also find credible Inspector Grose's testimony that the berm was constructed of loose and soft materials which were not compacted. Given the size of the 65-ton haulage trucks which used the roadway, I conclude and find that a driver would have difficulty distinguishing the roadway from a berm in the condition as the one described by Inspector Grose. Not only would the driver have difficulty seeing the berm from the driver's side of his truck, but he would also have difficulty in "feeling it" with the truck tires.

Given the fact that the berms and roadway outslopes had shown prior evidence of slippage and subsidence, particularly when it rained, and given the additional fact that mine management personnel were aware of these problems, I believe that a reasonably prudent person would have taken positive steps to insure that the berm was constructed of materials which would be compacted in such a manner as to allow a driver to know when he is on the berm. I also believe that a reasonably prudent person would have insured that the berm was constructed and maintained at a height which would have been readily observable to a driver. On the facts of this case, I am not convinced that Valley Camp acted reasonably to insure compliance with the cited standard, and I agree with MSHA's argument that the berm was inadequate. Accordingly, Citation No. 2127008 IS AFFIRMED.

In this case Valley Camp is charged with a violation of mandatory safety standard 30 C.F.R. § 77.1600(c), for failing to conspicuously mark or install warning devices at the haulage roadway location where the roadway was reduced from 25 feet to 14 feet 2 inches. The cited standard reads as follows: "Where side or overhead clearances on any haulage road or at any loading or dumping location at the mine are hazardous to mine workers, such areas shall be conspicuously marked and warning devices shall be installed when necessary to insure the safety of the workers."

There is a dispute as to the accuracy of the measurements concerning the width of the roadway as reflected in the map which is a part of MSHA's accident investigation report. Valley Camp's counsel asserted that the map measurements are critical because the useable portion of the roadway on which a truck could travel would be from the base of the spoil bank to the inner edge of the berm opposite the spoil (Tr. 647). Counsel took issue with Inspector Grose's testimony and notes concerning his measurements of the roadway as 14 feet 11 inches, and suggested that Mr. Augustine's testimony and calculations are more credible and reliable (Tr. 649).

MSHA's counsel expressed "tremendous difficulty" with Mr. Augustine using an "uncertified" map and a ruler to determine roadway widths (Tr. 650). Counsel pointed out that the mine superintendent took a measurement of the roadway width with a tape measure on the evening after the accident, and that at the point where Mr. Grose measured 14 feet, 11 inches, the superintendent's measurement was 14 feet, 8 inches (Tr. 653).

Mr. Augustine confirmed that his survey crew used a steel tape measure, as did Inspector Grose, but that while he observed Inspector Grose taking his measurements, at no time did Valley Camp and MSHA take the measurements together, nor were there any mutually agreed upon measurements taken at the time of the investigation. Valley Camp's counsel suggested that Mr. Grose deleted the single asterisk measurements from the map provided him by Mr. Augustine because Mr. Grose did not take those measurements (Tr. 652-653). Mr. Augustine could not recall where he observed the inspector's party taking measurements, nor could he identify the specific locations where these measurements were taken by reference to his map, other than "close to where the truck went over the road" (Tr. 667).

Valley Camp's position is that the accident victim was well over the berm in an area that was never intended to be driven on, and that the berm was built on the useable portion of the roadway from compacted materials brought in from the bedrock (Tr. 657). Assuming that the victim was out of control, or through "driver error" drove into or to the top of the berm, counsel asserted that at that point the victim had 19 feet 11 inches of roadway width to maneuver his truck, and more than adequate room to "hug the spoil." Counsel concludes that his failure to do so constituted "driver error," and that this error, rather than a slip in the roadway, caused the accident (Tr. 657). Counsel suggested further that had the victim followed "normal operating procedures," the accident would not have happened (Tr. 658).

The evidence in this case establishes that the haulage road in question was approximately 28 feet wide when it was first completed approximately 2 weeks before the accident. During this period of time, the roadway widths at the approximate location where the accident occurred were narrowed by the process of spoiling, as well as roadway maintenance and repair work which became necessary as a result of outslope slippage and berm subsidence. Estimates of the width of the roadway immediately before the accident varied, and after the accident, Inspector Grose, assisted by Inspector Slaughter, measured the width of the roadway at the point where the truck left the roadway, and he determined that the roadway was 14 feet 2 inches wide.

There are no mandatory safety standards covering roadway construction, nor are there any standards or guidelines which set forth the required roadway widths for haulage roads. Given the fact that 65 ton haulage trucks approximately 12 foot wide used the roadway in question, the critical question here is whether or not MSHA has established by a preponderance of the evidence that the side clearances along the stretch of the roadway where the accident occurred were hazardous. While the width of the roadway is critical in any determination of adequate side clearance, consideration must also be given to the condition of the roadway slope, the immediate edge of the roadway, and the adequacy of the berms.

Although truck driver James Westfall stated that he experienced no problems driving through the accident area prior to the accident, he confirmed that he would be about a foot from the berm as his truck passed through that portion of the roadway. He also confirmed that there were several narrow road locations where empty trucks would have to move over to yield the right-of-way to loaded trucks, and he

identified the roadway area at the accident location as an area where he knew that only one truck could pass.

Truck driver Winford Saunders testified that because of the rain and mud, at least 4 feet of the roadway at the accident location had slipped on the day of the accident, and that this resulted in the width of the roadway being reduced to a point where a 12-foot wide truck could not pass through. Mr. Saunders also testified that as a result of this condition, he and another driver refused to drive their trucks on that portion of the roadway.

Loader operator Bruce Estep testified that on the day of the accident a portion of the roadway approximately 50 feet from the accident location slipped, and he confirmed that Mr. Saunders advised him that truck drivers refused to drive their trucks through the area because "part of the road was gone." Mr. Estep also testified that in the immediate area of the accident location, he noticed that 3 to 4 feet of berm had fallen or slipped, and that the berm was gone. He estimated that the roadway at the accident location was 12 to 14 feet wide, and he considered this to be a narrow road. Although he believed that it was safe for an empty truck to drive through the area to the pit after he repaired the roadway which had slipped, he did not believe it was safe for a loaded truck to drive through, and he would not have done so.

Dozer operator Carl Anderson described the berm along the roadway at the scene of the accident as "small," and he indicated that the roadway at that location was at a "narrow place" which had been a problem area for a distance of at least 60 feet.

Loader operator David Nichols testified that on the day of the accident he observed that the berm at the accident location appeared to have subsided or slipped to a height of 6 to 8 inches, and that the roadway was narrow at that location. In his opinion the roadway at that point in time was not safe to travel.

Loader and dozer operator Steve Popp testified that there were daily maintenance problems with the roadway berm at the accident location up to and including the day of the accident. Mr. Popp was of the opinion that after the accident, the width of the roadway was only 8 feet, and while he indicated that he could have driven a dozer with a 12-foot wheel base over the roadway, he would have had to drive on a portion of the spoil bank.

Valley Camp's manager of technical services, Franklin Simmons, testified that except for certain areas where there was a need for providing a passing lane for vehicles, the "typical" roadway widths at the mine ranged from 16 to 18 feet. He estimated the roadway width at the accident location to be somewhat less than 16 to 18 feet, and he did not take issue with the roadway measurement widths of 14 feet 6 inches to 14 feet 2 inches, as shown on the map which is a part of MSHA's accident investigation report. Mr. Simmons confirmed that prior to the accident he was aware of slips which had occurred on the roadway, and he conceded that such slips should be monitored and taken care of.

Mine Foreman Roy Hanshaw testified that he was aware of berm slips a week or so before the accident and that spoil materials were used to widen the roadway for an additional 6 to 8 feet in the accident area. After the roadway was cut into the spoil, he estimated that it was 15 to 16 feet wide. He also mentioned the fact that on the day of the accident, there were problems with the berm in an area near the pit, and that in the area where the accident occurred he observed that there was some slippage on the outslope of the roadway for a distance of some 40 feet. After the accident, Mr. Hanshaw measured the distance from the spoil pile to the point where the truck cut into the road, and it was 14 feet 6 inches wide. Mr. Hanshaw conceded that it was not safe to drive through the accident area after the accident occurred, and he also indicated that had the outslope slippage prior to the accident continued, it was possible that an additional roadway would have to be constructed to contain the slippage.

Inspector Lively initially refused to abate the imminent danger when called upon to do so on March 10, 1984, several days after the accident. His refusal to do so was based on the fact that he observed a large crack in the berm, approximately 2 to 6 inches wide, and extending for a distance of approximately 150 feet. Mr. Lively was of the opinion that the crack resulted from the berm and roadway being constructed on unstable ground, and he was concerned that the crack would continue in the event of the ground freezing and thawing.

Although Mr. Saunders testified that 4 feet of the roadway at the immediate location of the accident had slipped prior to the accident, the testimony of Mr. Hanshaw and Mr. Estep is that the slip occurred at a roadway location closer to the pit and approximately 50 feet away. Having viewed the witnesses during their testimony, I conclude that Mr. Saunders was mistaken as to the actual location of the

slip in question. He appeared rather tentative in his testimony, while Mr. Estep and Mr. Hanshaw impressed me as being rather positive as to where that particular slip occurred, and MSHA did not recall Mr. Saunders in rebuttal even though he was available.

Apart from the conflict as to the location of the slip on the day of the accident, the witnesses were rather consistent in their description of the conditions which prevailed along the roadway in question immediately before the accident, particularly with respect to the condition of the berms and the outer edge of the roadway. The testimony establishes that the berm had slipped at the immediate accident location, that the roadway had narrowed to a point where there was only a foot or so of clearance between the outer edge of the roadway or the berm and a haulage truck driving through the area, and that slippage had occurred on the outslope of the roadway for a distance of some 40 feet.

Loader operators Nichols and Estep were of the opinion that it was not safe for loaded trucks to use that portion of the roadway at the accident site prior to the accident, and foreman Hanshaw believed that had the slippage continued, another roadway would have to be built to contain it. Foreman Maggard conceded that anytime a berm slips, a hazardous condition is created. It seems clear to me that when viewed collectively, these conditions establish that the side clearances along the haulage road at the immediate location of the accident, as well as at the roadway location nearer to the pit area some 50 feet away, were hazardous within the meaning of section 77.1600(c), and required markings or warning devices to alert the drivers of the hazardous conditions. Since it is clear from the record that no such markings or warning devices were provided, a violation has been established. Accordingly, Citation No. 2127009, IS AFFIRMED.

During the course of the hearing, Valley Camp's counsel asserted that as long as the miners are familiar with the conditions of the roadway and followed the traffic procedures, i.e., pulling over on the narrow portion of the roadway and yielding the right of way to a loaded truck, no warning signs or markers should be required. Counsel asserted further that if one knows that there is one-lane traffic in an area, a warning sign would make no difference, and "the question of whether it's hazardous is whether you know it's a one lane road or not" (Tr. 1344-1346). Counsel has reasserted this defense in her posthearing brief. In my view, the fact that such haulage procedures were in effect, and the fact that drivers were familiar with the one-lane portions of the roadway do not detract from the fact that

the standard requires that warnings be posted as necessary where the side clearances are hazardous. On the facts of this case, I have concluded that the side clearances were hazardous and that a warning sign was necessary.

In her posthearing brief, Valley Camp's counsel asserts that Inspector Slaughter testified that the one lane area was not unsafe since traffic travelled slowly and the designated pass areas were known to employees. Inspector Slaughter's testimony was in reply to a hypothetical question from me, and the question included the fact that such a single lane is posted. As a matter of fact, part of Mr. Slaughter's reply includes the statement that "these areas were marked for where the road is narrow" (Tr. 483). Taken in context, I cannot conclude that Inspector Slaughter agreed that warning signs were not required in this case. In any event, I reject Valley Camp's interpretation of the cited standard.

Significant and Substantial

Inspector Grose explained the reasons for his "S&S" findings as follows Tr. 450):

JUDGE KOUTRAS: You made S & S findings in both of these citations, significant and substantial. Can I ask you the basis on which you made the significant and substantial findings?

THE WITNESS: Yes. The basis I used to find S & S is that I felt that the event that would occur if this -- as a result of this violation would be -- have a high likelihood of occurring. And if, in fact, the event did occur the injury resulting from the occurrence would be very serious or fatal.

I conclude and find that the berm violation was significant and substantial. Given the conditions of the berm as discussed earlier in this decision, and particularly the fact that eyewitness Westfall indicated that the truck appeared to be on or near the berm for some distance before leaving the roadway, it seems clear to me that the berm did not provide an adequate warning to the driver. In these circumstances, the inadequate berm created a reasonable likelihood of an injury. In this case, the injury proved to be fatal. The inspector's "S&S" finding is therefore AFFIRMED.

I conclude and find that the failure by Valley Camp to install a warning sign or to conspicuously post the roadway area where the accident occurred constituted a significant and substantial violation. Given the hazardous side clearances of the road, which has been described as allowing a foot or so of clearance on the outer edge, and given the wet weather conditions and the fact that the area had shown evidence of slippage and subsidence for a period of time up to and including the very day of the accident, one would think that mine management would have acted promptly to post that portion of the roadway so as to alert the drivers and to remind them of the hazard which existed. While it may be true that the drivers were aware of the "rules of the road," and often passed through the one lanes of the roadway, rainy weather and other conditions such as outslope slippage, berm subsidence, sudden over-night slippages, and other such conditions could cause rather instant deterioration to the roadway. Unless such areas are constantly monitored and posted when signs of deterioration or failure appear, a driver may be lulled into a false sense of security, and absence a posted warning sign or other device to alert him of such conditions, I believe it is reasonably likely that an injury or accident would occur. The inspector's "S&S" finding is AFFIRMED.

Docket No. WEVA 84-168-R

In this case Valley Camp Coal Company challenges the legality of a section 107(a) imminent danger order issued by Inspector Grose in the course of his accident investigation. The order on its face alleges that an imminent danger existed because of the following collective conditions: (1) the roadway extending from the pit was not constructed of material selected to insure stability in that a section 200 feet outby the pit was constructed of spoil material with cracks and slips along the elevated edge; (2) the width of the roadway was reduced from 25 to 14 feet at the location where the truck involved in the fatal accident left the roadway; (3) the berm at the outer edge of the roadway was not adequate to retain the heavy equipment using the roadway in that loose, unconsolidated earth material was used to construct the berms; (4) there were no conspicuous markings or warning devices installed at the roadway location where the roadway width was reduced from 25 to 14 feet 2 inches; and (5) foremen Hanshaw and Maggard failed to conduct an adequate onshift examination.

Inspector Grose testified that the portion of his order regarding the alleged failure by Mr. Hanshaw and Mr. Maggard to conduct an adequate onshift examination of the roadway was deleted upon instructions from MSHA's District Manager

Kress, and Mr. Grose confirmed that he modified the order on April 10, 1984, by deleting this allegation (Exhibit CR-11). In explaining why this finding was deleted from the order, MSHA counsel Gismondi asserted that information available to her reflects that Mr. Kress acted after information received during a conference with the operator's representative indicated that the examinations were conducted and that the alleged violation of section 77.1713(a) could not be supported.

Section 107(a) of the Act provides as follows:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the condition or practice which caused such imminent danger no longer exists. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

"Imminent danger" is defined in section 3(j) of the Act, 30 U.S.C. § 802(j) as: "The existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

The former Interior Board of Mine Operations Appeals has held that an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations are permitted to proceed in the area before the dangerous condition is eliminated. The dangerous condition cannot be divorced from normal work activity. *Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals, et al.*, 491 F.2d 277, 278 (4th Cir. 1974). The test of imminence is objective and the inspector's subjective opinion need not be taken at face value. The question is whether a reasonable man, with the inspector's education

and experience, would conclude that the facts indicate an impending accident or disaster, likely to occur at any moment, but not necessarily immediately. Freeman Coal Mining Corporation, 2 IBMA 197, 212 (1973), aff'd., Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, et al., 504 F.2d 741 (7th Cir. 1974). The foregoing principles were reaffirmed in Old Ben Coal Corporation v. Interior Board of Mine Operations Appeals, et al., 523 F.2d 25 (7th Cir. 1975), where the court, following Freeman, phrased the test for determining an imminent danger as follows:

[E]ach case must be decided on its own peculiar facts. The question in every case is essentially the proximity of the peril to life and limb. Put another way: Would a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessarily immediately? The uncertainty must be of a nature that would induce a reasonable man to estimate that, if normal operations designed to extract coal in the disputed area proceeded, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger.

In her posthearing brief, Valley Camp's counsel takes issue with Inspector Grose's conclusion as reflected in his accident investigation report that the accident and resulting fatality were the result of mine management's failure to design and construct the roadway in question "in a manner consistent with prudent engineering." Counsel also takes issue with MSHA's contentions that substandard road construction, i.e., the asserted failure by Valley Camp to select suitable construction materials to insure the stability of the roadway, caused the accident.

As correctly pointed out by Valley Camp, there are no specific MSHA mandatory safety standards governing the construction or maintenance of surface mine haulage roads. Nor are there any published MSHA guidelines or other published standards defining or otherwise explaining "prudent engineering design." However, Inspector Grose was of the opinion that a properly constructed roadway is one which is constructed (1) on a rock base, (2) compacted out of material specially selected for road construction, and (3) constructed in layers or "lifts" that are properly compacted. Dr. Wu

agreed with the inspector, but added that compaction should be done at no greater than 2 foot lifts, and that adequate drainage be provided to avoid water saturation.

Inspector Grose conceded that he had no personal knowledge as to how the haulage road in question was originally constructed. He also conceded that he conducted no tests, took no soil samples, and made no other determinations as to the specific materials used to construct the roadway. Although he expressed some concern over the lack of drainage ditches, the fact is that none were required by MSHA to achieve abatement. Further, the same type of spoil materials used to initially construct the roadway, were also used to reconstruct it to abate the order. Inspector Grose was not present during the abatement, and Inspector Slaughter was there for only a half-hour at most. Under the circumstances, I can only conclude that they had little or no personal knowledge as to what was specifically done in terms of actual construction work to achieve abatement. As for MSHA's theory that the roadway was somehow undermined by water draining from a nearby augering operation, I reject that notion as total hindsight unsupported by any credible evidence.

Dr. Wu conceded that he had never been involved in the construction of haulage roads, and the record establishes that he never viewed the actual roadway at any time. When he made the site visit, the area had been mined out and the roadway was gone. His knowledge of the facts and circumstances in support of MSHA's theories as to how the roadway was constructed was obtained through contacts with the inspectors and miners during the preparation for the hearing, and his review of MSHA's accident report and other materials in preparation for the hearing.

I am not convinced that MSHA has established by a preponderance of the credible testimony and evidence in this case that Valley Camp's construction of the actual roadway itself was substandard. On the other hand, Valley Camp produced credible testimony from those directly involved in the roadway construction which establishes that the roadway was constructed on a solid rock base, was properly compacted with suitable spoil materials, and was constructed in appropriate layers or lifts. However, I am not convinced that the same can be said for the construction and maintenance of the berms, or for the slips on the out slopes adjacent to the roadway.

Valley Camp's counsel also takes issue with MSHA's assertion that the narrow width of the roadway, the failure to install warning signs, and the inadequacy of the berms contributed to the asserted imminent danger. In view of my

prior findings and conclusions on these issues, they need not be repeated here. However, the fact that a cited condition may or may not constitute a violation of any mandatory standard, is not relevant in any determination as to whether an imminent danger exists. What is relevant and critical is whether or not the conditions found by Inspector Grose after the accident support his conclusion that an imminently dangerous condition existed at that time. In order to support the order, MSHA must show that reasonable men with the inspector's education and experience would conclude that the condition of the roadway constituted a situation indicating an impending accident or disaster, likely to occur at any moment, but not necessarily immediately.

The accident in this case occurred on Monday, March 5, 1984, at approximately 4:30 p.m. Inspector Grose arrived at the mine the following morning March 6, at approximately 9:00 a.m., and he assumed supervision over the accident investigation. At the conclusion of his investigation, he issued the imminent danger order at approximately 4:00 p.m., on March 6. Inspector Grose confirmed that he issued the order because of the collective conditions described on the face of the order, and to preclude use of the roadway until those conditions could be corrected. While he believed that no one would attempt to use the roadway, he had to insure that no one attempted to drive it until the conditions were corrected (Tr. 183).

It seems clear to me that at the time of the investigation and inspection conducted by Inspector Grose the condition of the roadway was such as to support his conclusion that it was an imminent danger under the Act. Regardless of how the roadway was originally constructed, or whether or not the edge of the roadway failed or whether it was "taken out" by the accident victim driving over it, it clearly was not travelable by haulage trucks which normally used the road. In addition, the inadequacy of the berms, the hazardous side clearances, and the lack of readily identifiable warning signs, all contributed to a situation which in my view supports the action taken by Inspector Grose in issuing the order. Under all of these circumstances, I believe that any reasonable person would conclude that an accident was likely to occur at any moment if normal mining operations were allowed to continue. As a matter of fact, foreman Hanshaw and Maggard conceded that it was not safe to use the roadway after the accident and before abatement of the conditions. Truck driver Saunders would not drive the roadway after the accident because he feared for his safety, and driver James Westfall stated that he would not drive it because he was "shook up" over the accident. Under all of these circumstances, I conclude that Inspector Grose acted

appropriately and properly in issuing the order, and IT IS AFFIRMED.

Docket No. WEVA 84-352

Fact of Violations

In view of my previous findings and conclusions, Citation Nos. 2127008 and 2127009 citing violations of mandatory safety standards 77.1605(k) and 77.1600(c), ARE AFFIRMED.

History of Prior Violations

Exhibit G-16, is a computer printout summarizing the mine compliance record for the period January 1, 1980 through March 4, 1984. That record reflects that Valley Camp paid civil penalty assessments totaling \$653 for 19 section 104(a) citations issued at the mine. One of those citations is for a violation of the berm standard (77.1605(k)), on March 27, 1982, for which a civil penalty of \$20 was paid.

Inspector Slaughter confirmed that he has never issued citations for inadequate road construction at the mine, and he did not recall ever issuing any berm citations (Tr. 538). Valley Camp's counsel noted during the hearing that one previous citation for "no berm in an area" was issued (Tr. 539).

I cannot conclude that Valley Camp's compliance record warrants any additional increases in the civil penalty assessments made by me in this case. To the contrary, its history of compliance over the prior 4-years is good, and I have taken this into account in assessing the penalties in question.

Good Faith Abatement

The parties have stipulated that Valley Camp exhibited good faith compliance in achieving abatement of the citations and the order in question, and I adopt this as my finding in this matter and have taken it into account in assessing the penalties in question.

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Continue in Business

The parties do not address the size of the mining operation in question in their briefs. MSHA's computer print-out, exhibit G-16, identifies the mine "controller" as the Quaker State Oil Refining Corporation. However, testimony at the

hearings indicated that many of the miners were laid off, and that coal production may have been curtailed somewhat at the mining operation in question. I assume that Valley Camp is a small-to-medium sized mine operation:

Although Valley Camp's counsel argues that any civil penalties assessed by me should be nominal, there is no information or argument to suggest that the penalties proposed by MSHA will adversely affect Valley Camp's ability to continue in business. Under the circumstances, I conclude that the penalties which have been assessed by me for the violations which have been affirmed will not affect Valley Camp's ability to continue in business. See: Sellersburg Stone Co., 5 FMSHRC 283 (1983), aff'd, 736 F.2d 1147 (7th Cir. 1984).

Negligence

Inspector Grose testified that he believed that Valley Camp was "moderately" negligent with respect to both citations. He considered the weather conditions to be a mitigating circumstance, and he believed that the immediate supervisors may not have understood soil compaction and mechanics and the impact that adverse weather would have on the roadway in question (Tr. 184).

The evidence adduced in this case reflects that various members of mine management were aware of the slips that occurred near the roadway prior to the accident. It is also true that various miners were aware of slips and other signs of earth slippage along the roadway outslopes, as well as berm subsidence at the location of the accident, but did not inform mine management. However, mine management has the primary responsibility of insuring that such conditions are attended to and that corrective action is immediately taken to insure against roadway hazards.

While it is true that Mr. Hanshaw "monitored" the slip area, and that Mr. Augustine was "watching" it, I am not convinced from the record in these proceedings that much careful or detailed attention was paid to these conditions. Although Mr. Simmons testified that he never observed any breaks or fractures on the roadway surface itself, his concern appeared to be with the condition of the surface portion of the roadway and not the berms or adjacent slopes. In addition, Mr. Simmons conceded that when he examined the roadway, he simply looked at it while driving and did not get out of his vehicle to walk the roadway. Mr. Maggard testified that when he conducted his preshift examination on March 5, he remained in his vehicle. He also confirmed that he was unaware of any tree movement along the described slip

area adjacent to the roadway, and he did not know that Mr. Hanshaw had been monitoring the area.

I believe that the record here supports a conclusion that mine management had prior warnings that the roadway and berm in question was susceptible to slippage and subsidence. Given the roadway failure the day after the roadway was completed, the failure which occurred near the pit the very morning of the accident, and the prior evidence of slippage which had been noted by Mr. Augustine and Mr. Hanshaw, mine management should have taken immediate action to determine the causes for these events and should have taken precautionary or corrective steps to mark those areas of the roadway which were suspect, and to insure that the berm was adequately constructed and maintained. Under the circumstances, I conclude and find that Valley Camp knew or should have known of the violative berm and warning sign conditions cited in Citation Nos. 2127008 and 2127009, and that its failure to take corrective action before the inspectors found the conditions is the result of its failure to exercise reasonable care.

Gravity

Valley Camp argues that the berm violation had absolutely nothing to do with the cause of the accident, and that MSHA's proof went solely to the issue of whether the road construction caused the accident. This argument is rejected. I believe that the substandard and inadequate berm conditions played a role in the accident. Although I cannot conclude that the berm condition was the major cause of the accident, I do conclude and find that it contributed to the severity of the violation. Had the berm been constructed higher and been better compacted with solid rock materials, it is altogether possible that the driver would have been able to keep the truck on the roadway or at least had a greater opportunity to steer it back on the roadway. In this case, the eyewitness stated that the driver "got over too far" and appeared to be driving on or close to the edge of the berm. As I previously, concluded, a better constructed berm would have possibly permitted the driver to get a better "feel" for the actual roadway and may have served as a guide to keep him on the roadway surface. Under the circumstances, I conclude and find that the berm violation was serious.

With regard to the warning sign violation, I find that it too was serious. Since I have found that the side clearances of the roadway were hazardous, and that the roadway was narrow at the accident location, the lack of a warning sign or other conspicuous warning device was required in

order to alert the drivers to take extra care. While I cannot conclude that the lack of a warning sign caused or contributed to the accident, I still conclude that the failure to post any warnings constitutes a serious violation.

Civil Penalty Assessments

Valley Camp argues that the amount of the penalties assessed by MSHA were increased by the inspector's allegation that the berm and sign citations contributed to the existence of an imminent danger. Citing Consolidation Coal Company, 1 MSHC 1742 (1979), Valley Camp argues that the gravity of a violation must be weighed in light of a decedent's own contribution to the cause of the accident. In the instant case, Valley Camp maintains that the decedent contributed to the cause of the accident by driving the truck off the roadway or in other words, losing control of the vehicle. Furthermore, once the victim lost control of the vehicle, Valley Camp points out that he attempted to jump from the cab of the truck, and that this caused him to be thrown to the ground and crushed by the truck. Therefore, under Valley Camp's theory of the case, the berm and sign citations had nothing to do with the cause of the accident, and Valley Camp suggests that any penalties imposed should be substantially reduced.

I have taken into account the possibility that the accident victim may have lost control of the truck for reasons other than the lack of adequate berms, and that he may not have suffered fatal injuries had he elected to remain inside the cab when the truck left the roadway and went over the hill. I have also taken into consideration the fact that MSHA failed to establish that Valley Camp's roadway construction methods did not comport with "prudent engineering designs." However, the fact remains that the conditions which prompted the citations which have been affirmed were serious violations; the berm condition to a greater degree than the warning sign condition.

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, the following civil penalties are assessed by me for the citations which have been affirmed:

Citation No.	<u>Date</u>	30 C.F.R. Section	Assessment
2127008	3/6/84	77.1605(k)	\$2,500
2127009	3/6/84	77.1600(c)	500

ORDER

The respondent IS ORDERED to pay the civil penalties assessed by me in these proceedings within thirty (30) days of the date of these decisions. Payment is to be made to MSHA, and upon receipt of same, these proceedings are dismissed.

In view of my findings and conclusions in Docket Nos. WEVA 84-168-R and WEVA 84-170-R, Valley Camp's contests ARE DISMISSED.

Docket Nos. WEVA 84-172-R and WEVA 84-173-R

The violations in issue in these contests were settled by the parties after the conclusion of the first hearing session, and by motions filed pursuant to 29 C.F.R. § 2700.30, the parties submitted their settlement proposals to me for consideration. Under the terms of the settlements, Valley Camp Coal Company admits to the violations and agrees to pay the full amount of the civil penalties proposed by MSHA. After review of the settlement proposals, and taking into account the civil penalty criteria found in section 110(i) of the Act, the citations ARE AFFIRMED, and the settlements ARE APPROVED. Valley Camp Coal Company IS ORDERED to pay civil penalties in the amount of \$210 for Citation Nos. 2352240 and 2352241 (\$105 each), and payment is to be made within thirty (30) days of the date of the decisions. Valley Camp's contests ARE DISMISSED.


George A. Koutras
Administrative Law Judge

Distribution:

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/slk 1-31
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

AUG 14 1985

UNITED MINE WORKERS OF	:	DISCRIMINATION PROCEEDING
AMERICA ON BEHALF OF	:	
PATRICK M. HUGHES	:	Docket No. WEVA 84-404-D
Complainant	:	
	:	MORG CD 84-10
v.	:	
	:	McElroy Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Thomas M. Myers, Esq., United Mine Workers of America, Wheeling, West Virginia, for Complainant.
H. Brann Altmeyer, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Fauver

This proceeding was brought by United Mine Workers of America on behalf of Patrick M. Hughes (Complainant) under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. The Complainant charges a violation of section 105(c) based upon Respondent's refusal to pay Complainant for his time as a walkaround 1/ on the midnight shift, March 14, 1983, and its refusal to assign him duties for the remainder of that shift after the Federal inspection was concluded. On the date in question Complainant was scheduled to work on the day shift, but not the midnight shift.

The controlling issue is whether section 103(f) grants compensation rights to a miners' representative who accompanies a Federal inspector on a shift other than his regularly scheduled shift.

1/ A miners' representative who accompanies a Federal Inspector under section 103(f) of the Act.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following:

FINDINGS OF FACT

1. Consolidation Coal Company is the operator of the McElroy Mine, an underground coal mine in Marshall County, West Virginia, where Complainant is employed.
2. During the week beginning Sunday, March 11, 1984, and ending Saturday, March 17, 1984, Complainant held the job classification of trackman, which paid \$12.798 per hour. At all relevant times, Complainant was a member of the miners' elected Safety Committee.
3. During the week beginning Sunday, March 11, 1984, and ending Saturday, March 17, 1984, Complainant was scheduled to work the dayshift (8:00 to 4:00) for five days, Monday through Friday.
4. Complainant worked the day shift on Monday, March 12, Tuesday, March 13, Thursday, March 15, and Friday, March 16, 1984.
5. On Wednesday, March 14, 1984, Complainant did not work the day shift, but instead had come to the McElroy mine on the midnight shift (00:01 a.m. - 8:00 a.m.) and participated as the walkaround with Federal Inspector Charles Cruny for part of that shift.
6. The inspection conducted by Charles Cruny and participated in by Complainant ended at about 5:10 a.m., March 14, 1984.
7. Upon completion of the inspection, Complainant asked William Blackwell, a safety inspector of Consolidation Coal Company, for a job assignment for the rest of the midnight shift.
8. Respondent refused to provide Complainant Hughes with a job assignment for the rest of the midnight shift, and refused to pay Complainant Hughes any wages for that shift.
9. Complainant filed a timely complaint of discrimination pursuant to § 105(c) of the Act with the Mine Safety and Health Administration, United States Department of Labor.

By letter dated August 22, 1984, the Mine Safety and Health Administration determined that discrimination had not occurred. Complainant thereafter filed a timely complaint with this independent Commission.

10. Federal inspectors most frequently conduct their regular inspections of the McElroy Mine on the day shift, occasionally on the afternoon shift, and rarely on the midnight shift.

11. From January 1, 1984 through March 14, 1984, Federal inspections at the McElroy Mine occurred on the midnight shift only on March 12, 13, and 14.

12. At the McElroy Mine, the elected Safety Committeemen participated as walkarounds with Federal inspectors on all occasions, except when such committeemen were unavailable to participate or when a rank and file miner expressed a desire to accompany a Federal inspector as the walkaround.

13. No elected Safety Committeemen were assigned to work the midnight shift during the period between March 12 and 17, 1984.

14. On Friday, March 9, 1984, at the request of Rick Lipinski, Chairman of the Safety Committee, Safety Committeeman Randall Mulvey made reasonable efforts to find an employee assigned to the midnight shift during the week of March 12, 1984, who would be willing to participate as the walkaround with Inspector Cruny on that shift. Inspector Cruny had informed the union and company representatives that his inspections during that week would be conducted on the midnight shift.

15. Prior to the day shift on Monday, March 12, 1984, Lipinski found out that no one had traveled as the walkaround with Inspector Cruny on the preceding midnight shift. Lipinski again made reasonable but unsuccessful efforts to find an employee on the midnight shift who would agree to travel as the walkaround with Inspector Cruny for the upcoming midnight shift, Tuesday, March 13, 1984. One miner agreed to serve as a walkaround, but later declined to do so.

16. No employee participated as a walkaround with Inspector Cruny on the midnight shift on March 13.

17. On the day shift, Tuesday, March 13, Lipinski called a meeting of the Safety Committee to discuss the fact that no midnight shift employee had participated as the walkaround for Inspector Cruny on the two preceding midnight shifts.

18. At that meeting, Complainant volunteered to come to the mine for the midnight shift on Wednesday, March 14, 1984, so that a representative of the miners would be available to accompany Inspector Cruny on his inspection.

19. Had an employee on the midnight shift of Wednesday, March 14, 1984, chosen to participate as the walkaround for Inspector Cruny, Complainant would have gone home instead of so participating.

20. No midnight shift employee chose to participate as the walkaround with Inspector Cruny on Wednesday, March 14, 1984.

21. The miners at the McElroy Mine were generally aware of the fact that employees who participated as walkarounds were routinely assigned the task of picking up papers and trash for the rest of the shift, when the inspection was concluded toward the end of such shift.

22. On Monday, March 12, and Tuesday, March 13, 1984, Inspector Cruny wrote no citations or orders during his inspections of the McElroy Mine on the midnight shift.

23. On Wednesday, March 14, 1984, while accompanied by a walkaround (Complainant), Inspector Cruny wrote three citations during his inspection of the McElroy Mine on the midnight shift.

24. Complainant's absence from his regularly scheduled shift on March 14 (the day shift) was excused by Respondent.

25. On March 13, Complainant told mine management that he would be coming to the mine to serve as walkaround on the midnight shift, March 14. Complainant was advised by William Blackwell and Allen Olzer, safety inspector and supervisor for Respondent, respectively, that he would not be prevented from participating as a walkaround on other than his regularly scheduled shift, but that he would neither be paid for the period of such participation nor assigned work for the remainder of the shift, because he was not regularly scheduled or entitled to be paid for that shift.

26. Fifteen of the 35 miners scheduled to work on the midnight shift of March 14, 1984, had previously served as walkaround representatives of miners.

27. As conceded by Complainant's witnesses, and in Complainant's answers to Respondent's interrogatories, any of the 35 regularly scheduled miners assigned to the midnight shift on March 14 were fully qualified to serve as walkarounds.

28. The miners' Safety Committee never requested that the mine superintendent assign a Safety Committeeman to each of the three shifts, in order to facilitate their participation as walkarounds on any shift.

29. As a matter of established practice, miners who participated as walkarounds were reassigned to their regularly assigned duties for the remainder of the relevant shift, if time permitted.

30. As a matter of custom and practice, when the duration of the inspection did not leave reasonable time for the walkaround to return to his regular location to finish the shift, the walkaround was assigned the task of policing the mine, including picking up combustible materials which were left on the mine floor.

31. Management of the mine, including the assignment of miners to their work shifts, was exclusively reserved to Respondent under the governing collective bargaining agreement.

DISCUSSION WITH FURTHER FINDINGS

Section 103(f) of the Act provides that "a representative authorized by his miners shall be given an opportunity to accompany [a Federal inspector]," and when the "representative of miners ... is also an employee of the operator [he] shall suffer no loss of pay during the period of his participation in the inspection made under this subsection."

Complainant was not scheduled to work on the midnight shift of March 14, 1984, during which he acted as a walkaround representative of miners on a Federal inspection. As he was not scheduled to work on the shift in question, his claim raises the question whether a refusal to pay him for that shift constituted a "loss of pay."

In Beaver v. North American Coal Corporation, 3 FMSHRC 1428 (1981), the complainant charged discrimination for the operator's refusal to compensate him for participation in an inspection on a day when the complainant was not scheduled to work. Judge Cook rejected arguments similar to those made herein that the only germane considerations are whether the individual was selected by the miners to act as a walkaround representative and whether that individual was an employee of the operator. Consistent with Respondent's position herein, the Judge stated:

"the walkaround provision is designed to encourage miner participation in inspections by providing an assurance that their designated representative will suffer no loss in pay as a result of participating in such inspection i.e., that his participation in an inspection will place him in the same position with respect to his pay that he would have occupied had he not participated in the inspection. It was not intended to create a right to compensation where none otherwise existed."

In UMWA ex rel Colchagie v. Consolidation Coal Company, 5 FMSHRC 1469 (1983), complainant was a walkaround on a shift when he was not scheduled to work. Citing the Beaver decision, Judge Melick held that the employer did not discriminate against complainant in failing to compensate him, nor in charging him with an unexcused absence for failing to appear at his next, regularly scheduled shift. The complainant argued that he was the only qualified miner available to accompany the inspector during the shift in question. Judge Melick found the evidence in that regard unpersuasive, in view of the nature of the inspection and the availability of other miners. In the instant case, the evidence shows that Inspector Cruny was conducting merely a regular, general inspection, and that any of the midnight shift miners were qualified to serve as a walkaround. Examination of the list of 35 miners scheduled to work the shift in question revealed that at least 15 of those miners had previously served as walkarounds.

Complainant relies upon Secretary of Labor v. Virginia Pocahontas Coal Company, 3 FMSHRC 1493 (1981), in which Judge Steffey found that the employer had discriminated against the complainant in failing to provide him with a work assignment for the remainder of the shift (not his scheduled shift) during which he had served as walkaround, where the complainant had been paid for the time during which he participated in the inspection. However, Judge Steffey indicated that, absent a compelling showing of the necessity for a walkaround assigned from a different shift, management may insist that a scheduled employee on the inspection shift act as the walkaround in the order to invoke the protection of section 103(f). In that case, there was evidence that the mine employees conducted a special meeting for the purpose of designating the Safety Committee members as their walkaround representatives and that, presumably with knowledge of that designation, the operator scheduled the Safety Committee members so that no committee member was on the shift inspected. Virginia Pocahontas, 3 FMSHRC, at 1494-1495. In the instant case, the facts are different. Complainant's own evidence shows that any of the midnight shift miners could have served as a walkaround, and in fact repeated union efforts were made to appeal to them to serve as a walkaround. Safety Committeeman Richard Lipinski testified that he had managed to persuade Forrest Allen, a midnight shift miner, to serve as a walkaround during that week. Mr. Allen was not, and never had been, a member of the Safety Committee. (Allen did not serve as a walkaround that week, stating that he had a cold.) In addition, nearly half of the regularly scheduled midnight shift employees had previously served as walkarounds; and yet had never been Safety Committee members.

Also distinguishing the instant case from Virginia Pocahontas is the testimony of Respondent's mine superintendent, conceded by Complainant's witnesses, that despite repeated requests, no list of designated walkarounds was ever provided to Respondent. In fact, union representatives advised Respondent that they had not designated specific walkarounds, but that in their opinion all employees on the seniority roster should be considered "designated walkarounds."

I conclude that, under section 103(f) of the Act, a mine operator has no duty to compensate a miner for time spent as a walkaround on a Federal inspection on a shift other than his regularly scheduled shift, where the facts show that other miners on the inspection shift were available as qualified walkarounds but exercised their discretion not to serve as walkarounds.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this proceeding.
2. Complainant has failed to prove a violation of section 103(f) or section 105(c) of the Act.

ORDER

WHEREFORE IT IS ORDERED that this proceeding is DISMISSED.


William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

AUG 22 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 83-170
Petitioner	:	A.C. No. 15-05394-03504
	:	
v.	:	No. 7 Mine
	:	
JOHNIE CHILDERS COAL COMPANY,	:	
INC.,	:	
Respondent	:	

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor,
U. S. Department of Labor, Nashville, TN,
for Petitioner;
No appearance for Respondent.

Before: Judge Fauver

This civil penalty case was scheduled for hearing at 9:00 a.m., on July 25, 1985, at Lexington, Kentucky, pursuant to a notice of hearing issued under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq.

Counsel for Petitioner appeared with witnesses and documentary evidence. Respondent did not appear, and was held in default, whereupon evidence was received from Petitioner.

Having considered the evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following:

FINDINGS OF FACT

1. At all relevant times, Respondent operated Mine No. 7, an underground coal mine in Kentucky, which produced coal for sales substantially affecting interstate commerce.

2. Mine No. 7 regularly employed about 7 to 10 miners and produced about 25,000 tons of coal annually.

3. On August 2, 1982, Federal Inspector James Frazier observed that the roof bolting operation was not adequately lighted in that the roof bolting machine had no operable lights. At least four lights were required for adequate lighting. On the basis of his inspection he issued Citation No. 2046863, charging a violation of 30 C.F.R. § 75.1719. Section 1719 is the general section requiring adequate illumination in the working place in a mine. More specifically, § 75.1719-1(c) and (e) (5) state that, with roof bolting equipment, the area required to be illuminated, "in addition to [illumination] provided by personal cap lamps," is that which is within the miner's normal field of vision and, where the distance from the floor to the roof is five feet or less (as was the case here) that area is defined to include the face, ribs, roof, floor, and exposed surfaces of mining equipment that are within an area the perimeter of which is five feet from the roof bolting machine.

(a) Negligence. Respondent knew about the lighting requirement, but failed to install any lights on the roof bolting machine before the inspection. This conduct was clear negligence, even though Respondent had the machine for only two weeks.

(b) Gravity. Failure to provide lighting for the roof bolting operation created a serious safety hazard for the roof bolter and anyone who might be in the area while the roof bolting machine was operating. Without adequate lighting, the roof bolter might not see hazards in the roof, face, ribs, or floor, and his operating of the roof bolting equipment without adequate light could contribute to a fatal or serious injury.

(c) Compliance History. Respondent had one prior illumination violation.

4. On August 4, 1982, Inspector Frazier observed that the roof bolting machine (involved in Finding No. 3) did not have a panic bar, in order to deenergize the tramming motor of the machine quickly in case of an emergency. Because of this condition, he issued Citation No. 2046870, charging a violation of 30 C.F.R. § 75.523.

(a) Negligence. Respondent knew about the requirement for a tramming panic bar, but failed to install one before the inspection. Although Respondent had the machine for only about two weeks, it was clear negligence to put the machine in operation before it was properly equipped with a panic bar or other no less effective emergency device.

(b) Gravity. Failure to provide a panic bar created a serious safety hazard for the roof bolter and others who might be in the area when the bolting machine was being trammed. In an emergency, if the roof bolter were squeezed against a rib or other place in the mine and were unable to reach the normal controls while tramming the roof bolting machine, a panic bar could save his life or prevent serious injury by enabling him to stop the equipment.

(c) Compliance History. Respondent had one prior violation of section 75.523.

5. On December 20, 1982, Federal Inspector Prentiss Potter observed that shuttle car No. 78-W-14 was being operated without operable brakes. The brakes did not operate

because they did not have adequate hydraulic fluid. The shuttle car was used to transport coal from the face to a dumping point outside the mine. Because of this condition, Inspector Potter issued Citation No. 2047192, charging a violation of 30 C.F.R. § 75.1725.

(a) Negligence. Respondent knew or should have known about the requirements of section 30 C.F.R. § 17.1725, which provides in section 17.1725(a):

"(a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

The shuttle car operator knew the brakes were inoperable, because Inspector Potter saw him pushing the brake pedal to the floor without stopping the machine.

(b) Gravity. Operating the shuttle car without operable brakes created a serious safety hazard for the shuttle car operator and other miners in the area where the shuttle car traveled.

(c) Compliance History. Respondent had no prior violation of 30 C.F.R. § 75.1725.

6. On December 21, 1982, Federal Inspector Steve Kirkland observed that the coal drill operator was drilling coal without using a line curtain for ventilation. Because of this condition, Inspector Kirkland issued Citation No. 2047193, charging a violation of 30 C.F.R. § 75.316. That section requires that the operator adopt an approved ventilation plan. Respondent's plan required that a line curtain be hung at each heading to obtain an air flow at the working face from the last open cross cut. Without a line curtain there,

there was no perceptible air flow at the working face where the citation was issued. After a line curtain was installed to abate the violation, a reading of 3,100 cfm of air at the working face was obtained.

(a) Negligence. Respondent knew the requirements of its own ventilation plan. It was clear negligence not to ensure that its plan was being complied with.

(b) Gravity. Drilling coal without adequate ventilation is a most dangerous practice, running the risk of a dust or methane explosion, or propagating a mine fire, and subjecting miners to hazards of pneumoconiosis.

(c) Compliance History. Respondent had one prior violation of section 75.316.

DISCUSSION WITH FURTHER FINDINGS

I find that each of the violations charged was proved, was due to clear negligence, and was a serious violation that could contribute to a fatal or serious injury. Respondent is credited with making a good faith effort to achieve rapid compliance after each violation was cited.

Respondent is a small operator, operating a small mine.

Considering each of the criteria for assessing a civil penalty under section 110(i) of the Act, I find that an appropriate civil penalty for each of the violations found herein is \$125.

CONCLUSION OF LAW


1. The Commission has jurisdiction in this proceeding.
2. Respondent violated 30 C.F.R. § 75.1719 as charged in Citation No. 2046863.
3. Respondent violated 30 C.F.R. § 75.523 as charged in Citation No. 2046870.

4. Respondent violated 30 C.F.R. § 75.1725 as charged in Citation No. 2047192.

5. Respondent violated 30 C.F.R. § 75.316 as charged in Citation No. 2047193.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay civil penalties in the total amount of \$500 for the above violations within 30 days of this Decision.



William Fauver
Administrative Law Judge

Distribution:

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Mr. Dean Price, President, Johnie Childers Coal Company, Inc., Box 65, Rockhouse, KY 41561 (Certified Mail)

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ADMINISTRATIVE LAW JUDGES
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AUG 22 1985

JAMES KING,	:	DISCRIMINATION PROCEEDINGS
KENNETH MUSIC, and,	:	
JOHN D. MUSIC, JR.,	:	Docket No. KENT 85-41-D
Complainants	:	MSHA Case No. PIKE CD 84-13
v.	:	
	:	Docket No. KENT 85-42-D
E & T TRUCKING and,	:	MSHA Case No. PIKE CD 84-13
ELMO MAYES,	:	
Respondents	:	Docket No. KENT 85-43-D
	:	MSHA Case No. PIKE CD 84-13

ORDER OF DISMISSAL

Appearances: Stephen A. Sanders, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., Prestonsburg, Kentucky and Tony Oppegard, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., Hazard, Kentucky for Complainants;
Edward M. Dooley, Esq., Middlesboro, Kentucky; for Respondents.

Before: Judge Melick

At hearings, the parties agreed upon a settlement and the Complainants accordingly, request to withdraw their Complaints herein. Under the circumstances permission to withdraw is granted. 29 C.F.R. § 2700.11. The cases are therefore dismissed.


Gary Melick
Administrative Law Judge

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Tony Oppegard, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., P.O. Box 360, Hazard, KY 41701 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 27, 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 85-2-M
Petitioner	:	A. C. No. 19-00076-05504
	:	
v.	:	Docket No. YORK 84-12-M ¹ /
	:	A. C. No. 19-00076-05503
S. M. LORUSSO & SONS, INC.,	:	
Respondent	:	West Roxbury Crushed Stone

DECISION

Appearances: David L. Baskin, Esq., Office of the
Solicitor, U. S. Department of Labor, Boston,
Massachusetts, for Petitioner;
Michael E. Bussiere, S. M. Lorusso & Sons, Inc.,
Walpole, Massachusetts, for Respondent.

Before: Judge Merlin

These cases are petitions for the assessment of civil penalties. They were heard at the same time and are hereby consolidated for decision.

Citation No. 2367541 was issued for a violation of 30 C.F.R. § 56.5-50(b) because an employee had been exposed to noise in excess of the maximum permissible level. However, the employee was wearing approved protective headwear and the exposure was in the nature of an isolated instance since the operator was in compliance at other times. The operator is very small in size. It has an excellent history of prior violations with only two violations for the preceding 24 months. In light of these facts, a penalty of \$20 is assessed.

Citation No. 2367931 was issued for a violation of 30 C.F.R. § 56.14-1 because a guard was not provided for the V-belt on the plant feeder. The violation was serious because a

1/ The front page of the Administrative transcript erroneously refers only to YORK 84-12-M but both dockets were heard. Accordingly, the front page is hereby amended to refer to both.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

AUG 28 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 84-181
Petitioner	:	A.C. No. 15-13732-03512
v.	:	
	:	Ella Coal Mine
ELLA COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Mary Sue Ray, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville,
Tennessee, for Petitioner;
Ella Smith, President; Alan Smith, Jr.,
Vice-President, Ella Coal Company,
Manchester, Kentucky, Pro Se.

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments in the amount of \$208, for five alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. .

The respondent filed an answer to the civil penalty proposals and stated that it is a small family owned company mining approximately 75 tons of coal daily "when our equipment isn't broken down." Respondent also stated that it employs "mostly family employees," and that after paying debts, has no money to retain an attorney. Respondent asserts that it timely corrected all of the cited conditions.

This case was originally assigned to Judge Charles C. Moore, Jr., but was reassigned to me upon Judge Moore's retirement. In response to a pretrial order issued by Judge

Moore, the petitioner's counsel advised him that the mine operator informed counsel that he was having severe financial problems, and that this may merit a reduction of the proposed civil penalty assessments. Counsel also advised that the operator was having a financial statement prepared by his accountant and that pending its receipt, the parties contemplated a settlement of the matter.

An exchange of correspondence in the file reflects that the respondent submitted its income tax return for the year 1982 to the petitioner's counsel, and that counsel rejected it as inadequate to support the respondent's contention that he is unable to pay the assessed penalties. Subsequently, by motion filed May 22, 1985, petitioner's counsel requested that the case be scheduled for trial. Counsel stated that she was informed that the respondent is still in business producing coal.

A hearing was convened in London, Kentucky, on July 25, 1985, and the parties appeared and participated fully therein. Respondent appeared pro se through three of its corporate officers, all members of the same family.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Issues

The respondent has conceded that the violations occurred as charged in the citations issued by the inspector upon inspection of the mine. The only issue presented is whether or not the respondent has established that it is financially unable to pay any of the civil penalties assessed in this case, and whether the payment of such penalties will affect its ability to remain in business.

Discussion

The citations issued in this case are as follows:

Section 104(a) Citation No. 2198132, was issued on March 20, 1984, and it cites a violation of 30 C.F.R. § 75.305. The inspector states that the violation was issued because of inadequate records of the weekly hazardous conditions examinations in that the records were not up to date and the last recorded examination was on February 27, 1984.

Section 104(a) "S & S" Citation No. 2198134, was issued on March 20, 1984, and it cites a violation of 30 C.F.R. § 75.1722(a). The inspector states that the belt pulley drive assembly (belt and fly wheels), on an electric water pump located approximately 200 feet outby the No. 2 face in the No. 2 entry on 001 section, was not guarded. The inspector stated that the pump stays "in almost constant use and is attended to regularly, which would require a person to be in close proximity to the drive assembly."

Section 104(a) Citation No. 2198135, was issued on March 20, 1984, and it cites a violation of 30 C.F.R. § 75.302(a). The inspector states that the No. 1 and 3 working faces on the 001 section were inadequately ventilated in that no line brattice, or "inadequately installed" brattice, were provided at the faces to provide a perceptible movement of air to the faces.

Section 104(a) Citation No. 2197043, issued on March 26, 1984, cites a violation of 30 C.F.R. § 75.316. The inspector states that the mine approved ventilation system and methane and dust control plan was not complied with in the old, abandoned headings on the right of the main entries approximately 300 feet inby the portal, in that (1) three stoppings were missing and no air was reaching the end of the workings, and (2) a crosscut was not provided at the face of 3 of the 5 old faces as required by the plan. The inspector indicates that these entries extend for approximately 500 feet, and are located on the intake-air side of current active workings.

Section 104(a) "S & S" Citation No. 2197044, issued on March 26, 1984, cites a violation of 30 C.F.R. § 75.1306. The inspector states that an explosive and detonator storage box located in the last open crosscut between the No. 3 and 4 entries in the 001 section was improperly stored in that it was located 2 feet from two energized trailing cables. The inspector indicted that the box contained 12 tubes of permissible explosives (water gel), and one box of electric detonators, which were stored in separate compartments.

Petitioner's Testimony and Evidence

MSHA Inspector Gary Paul testified that he is currently assigned to inspect the Ella Coal Mine and that he last inspected the mine on the evening of July 24, 1985, as part of his regular weekly inspection. Mr. Paul described the mine as a small non-union family operated underground coal mine employing a total of 14 miners. Two of the employees

are the son and daughter of Mr. Alan Smith, Sr., and two are his son-in-laws. The remaining 10 employees are non-family members.

Mr. Paul stated that the mine operates on one production shift, and produces approximately 75 to 100 tons a day. During his past two recent inspections he observed that the mine was still in production. Although he has found that the mine has been down in the past during his inspections for 2 hours or so because of equipment breakdowns, it has been a "running and operating" mine.

Mr. Paul stated that the mine is in good condition and that the respondent conducts a safe operation. To his knowledge, all prior citations which have been issued at the mine have always been timely abated and the cited conditions corrected. The citations in question in these proceedings were promptly abated in good faith.

MSHA Inspector James Brashear, confirmed that he issued the citations in question in this case and that they were terminated after the conditions were timely abated by the respondent. Mr. Brashear agreed with Inspector Paul's assessment of the respondent's mining operation. He identified the Wagon Fork Mining Company as another similar small mining operation in his district, and he has heard "through the office grapevine" that it has paid none of the civil penalties which have been assessed by MSHA.

Respondent's Testimony and Evidence

Alan Smith, Sr., stated that he has no connection with the operation of the mine. He confirmed that he owns the equipment, but that he leases it to his son Alan Smith, Jr., who serves as the Vice-President of the company. Mr. Smith stated that the mine is in poor financial condition and that he has received no payments from the company for the leased equipment. He indicated that his son works the mine, and his daughter is also employed there as a surface worker. His son makes \$10 an hour, and his daughter is paid \$5 an hour, and he confirmed that all employees who work underground are paid \$10 an hour, and that surface employees are paid \$5 an hour.

Mr. Smith stated that at one time he operated the mine but turned it over to his son because his son wanted to be a miner. Mr. Smith stated that the mine provides employment for 14 local families, and in his opinion, the company cannot afford to pay any civil penalties. He stated further

that he has advised his son to get out of the business, and that the company is attempting to sell the mine to someone who is better able to financially support the operation.

Mrs. Ella Smith stated that she is the mother of Alan Smith, Sr., and that she serves as president of the company. She stated that she receives no salary or compensation from the company. She confirmed that the current price of the coal which the company sells is \$28 a ton. She stated that the mine is in poor financial condition, and she could not afford to pay the penalties which have been assessed by MSHA. Although she agreed that the mine is in current operation and is producing, she stated that it was flooded and out of production for 3 months during April or May, 1984, and that it has been out of production for intermittent periods in the past because of equipment breakdowns.

Alan Smith, Jr., stated that he is the Vice-President of the company and is also a salaried employee. The mine provides employment for him, as well as the other miners working there, and he receives a salary for his work. He indicated that while the mine is currently operating, its finances are strained and he is currently negotiating to sell the coal lease and turn the equipment lease over to another operator. He stated that if this is done the company will receive no money compensation, but that he expects to stay on as a salaried employee if the proposed deal is consummated.

Mr. Smith stated that the company retains an accountant to prepare its financial statements, but that it could not afford to pay him to come to the hearing to testify. Mr. Smith stated that he did not bring any financial statements with him to the hearing, and when asked why this was not done, he indicated that he believed that the statements were previously submitted to MSHA's counsel.

Mr. Smith confirmed that the mine employs 14 individuals, and he estimated the daily production as 65 to 75 tons. He also confirmed that he leases the equipment from his father, Alan Smith, Sr. He also indicated that the company cannot afford to pay any amount which may be assessed in these proceedings, and he confirmed that prior assessments have not been paid because the company cannot afford it. He stated that the company has no reserve funds, and that any "extra money" which may be generated by the company is used to keep the equipment operating, and if this were not done he would have to shut down his operation and the miners working there would be without employment.

Mr. Smith did not dispute the fact that the conditions or practices described by the inspector on the face of the citations constituted violations of the cited mandatory standards. He conceded that the violations occurred as stated by the inspector, and he pointed out that the conditions were promptly corrected and abated.

Findings and Conclusions

Fact of Violations

The respondent did not contest the violations and conceded that the conditions or practices cited by the inspector occurred. Under the circumstances, all of the citations ARE AFFIRMED as issued.

History of Prior Violations

Exhibit G-2, is an MSHA computer print-out which reflects that during the period March 20, 1982 through March 19, 1984, respondent was assessed a total of \$666, for 26 section 104(a) citations issued at the mine. Except for the payment of one \$20 "single penalty assessment," the information provided in the print-out reflects that the respondent has not paid any of the remaining 25 penalty assessments.

Petitioner's counsel confirmed this information, and explained that the respondent has been issued MSHA "default letters" for the unpaid civil penalty assessments, and that they have been forwarded to the Department of Justice for collection action.

Good Faith Compliance

The record here establishes that the cited conditions or practices were promptly abated in good faith by the respondent, and this has been taken into account by me as well as by MSHA's initial civil penalty assessment proposals.

Negligence

The respondent does not dispute the fact of violations and does not take issue with any of the inspectors findings as stated on the face of the citations. Under the circumstances, the inspector's negligence findings are affirmed, and I conclude and find that the violations resulted from the respondent's failure to take reasonable care, and that this amounts to ordinary negligence.

Gravity

The respondent has not disputed the inspector's gravity findings. Upon review of the cited conditions or practices, I conclude and find that with the exception of the record keeping citation (No. 2198132), the remaining violations were all serious. Although two of those citations resulted in automatic "single penalty" assessments of \$20, this obviously was the results of the inspector's finding that they were not "significant and substantial" violations. However, I am not bound by those findings, and I note that the conditions or practices described deal with lack of adequate ventilation and inadequately stored explosives.

Size of Business and Effect of Civil Penalty Assessments on the Respondent's Ability to Continue in Business

The record establishes that the respondent is a small, family operated mining operation. Petitioner's counsel does not dispute the respondent's contention that the officers of the company receive no compensation in their capacities as officers. Counsel indicated that the only information furnished by the respondent to support its contention that it is unable to pay the \$208 which has been assessed for the five citations in question is a 1982 tax return. Although that return indicated a loss for tax purposes, counsel stated that no current information has been forthcoming from the respondent to indicate any real or net operating losses. Absent this information, counsel is of the view that the respondent has not carried its burden in establishing that it is financially unable to pay the proposed assessments.

Petitioner's counsel also pointed out that the proposed assessments have already taken into account the fact that the respondent is a small operator, and in counsel's opinion the proposed assessments are reasonable. Since the respondent has furnished no additional information concerning its financial condition, counsel is of the view that any additional decreases in the assessments are not warranted.

Petitioner's counsel offered a letter dated October 29, 1984, from Mrs. Ella Smith, exhibit G-1. That letter includes a copy of the respondent's 1982 tax return, and copies of certain payroll taxes information. Although the letter makes reference to a 1984 tax return for the period ending August 31, 1984, it has not been produced.

Although I have no reason to doubt that this small operation has a cash flow problem and that it has encountered some problems with the mine being down for relatively short periods due to flooding or mechanical breakdowns, it is still a productive mine and there is no evidence that the operators have failed to meet their payrolls or other daily operational expenses, or have had to lay off workers because of their financial condition. Further, the operators identified several of their customers, and Mrs. Smith indicated that the company receives \$28 a ton for its coal. Although Mr. Smith, Jr., indicated that the coal supply may be diminishing, Mr. Smith, Sr., indicated that there is a ready supply of coal reserves, and that the company is negotiating with a potential buyer who may be in a better position to invest more capital in the venture.


The burden is on the respondent to establish that payment of the assessed civil penalties will adversely affect its ability to continue in business. In this case, petitioner's counsel has been most patient with the respondent in her attempts to have the respondent produce more current financial information to support its plea of poverty; all to no avail. In the absence of proof that the imposition of civil penalties will adversely affect its ability to continue in business, it is presumed that no such adverse affect would occur. *Sellersburg Stone Co.*, 2 MSHC 2010 (1983); *aff'd*, 736 F.2d 1147 (7th Cir. 1984); 3 MSHC 1385 (1984).

On the facts of this case, I conclude and find that the respondent has failed to establish through any credible evidence or testimony that the payment of the \$208 assessments in this case, which I find are reasonable, will adversely affect its ability to continue in business. I remain unconvinced that the respondent will go out of business if it pays these assessments. The respondent has been actively and productively mining coal since at least 1982, and has provided gainful employment for at least 14 individuals and their families. The testimony here establishes that the Smith family operates a safe and relatively efficient mine, and while it appears that they are meeting their expenses, it has paid only one of the civil penalties previously assessed against it. With the exception of three citations, all of the remaining citations have been "single penalty" assessments of \$20 each. However, according to Mr. Smith, Jr., all "extra money" is put back into the business, and he apparently has opted to ignore his obligations to pay these assessments on the ground that they do not contribute to his coal production.

ORDER

On the basis of foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the proposed civil penalty assessments made by the petitioner in this proceeding are appropriate and reasonable for the section 104(a) citations which have been affirmed. The respondent IS ORDERED to pay the penalty assessments in question within thirty (30) days, as follows, and payment is to be made directly to MSHA:

Citation No.	<u>Date</u>	30 C.F.R. Section	Assessment
2198132	3/20/84	75.305	\$ 20
2198134	3/20/84	75.1722(a)	63
2198135	3/20/84	75.302(a)	20
2197043	3/26/84	75.316	20
2197044	3/26/84	75.1306	85
			<u>\$208</u>


George A. Koutras
Administrative Law Judge

Distribution:

Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Mr. Alan Smith, Jr., Vice President, Ella Coal Company, Rural Route 7, Box 207, Manchester, KY 40962 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

AUG 29 1985

ALABAMA BY-PRODUCTS CORP.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. SE 85-18-R
	:	Citation No. 2480143; 10/16/84
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. SE 85-19-R
ADMINISTRATION (MSHA),	:	Citation No. 2480144; 10/16/84
Respondent	:	
	:	Docket No. SE 85-20-R
	:	Order No. 2481839; 10/16/84
	:	
	:	Docket No. SE 85-21-R
	:	Citation No. 2481840; 10/16/84
	:	
	:	Docket No. SE 85-23-R
	:	Citation No. 2481845; 10/16/84
	:	
	:	Docket No. SE 85-24-R
	:	Citation No. 2481846; 10/16/84
	:	
	:	Docket No. SE 85-26-R
	:	Order No. 2480147; 10/22/84
	:	
	:	Segco No. 1 Mine
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 85-82
Petitioner	:	A.C. No. 01-00347-03604
v.	:	
	:	Docket No. SE 85-89
	:	A.C. No. 01-00347-03606
ALABAMA BY-PRODUCTS CORP.,	:	
Respondent	:	Segco No. 1 Mine

DECISIONS

Appearances: H. Thomas Wells, Jr., Esq., Maynard, Cooper,
Frierson & Gale, and J. Fred McDuff, Alabama
By-Products Corporation, Birmingham, Alabama,
for the Contestant/Respondent;

George D. Palmer and Cynthia Welch, Esqs.,
Office of the Solicitor, U.S. Department of
Labor, Birmingham, Alabama, for the
Respondent/Petitioner.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern the captioned citations and orders issued to the Alabama By-Products Corporation (ABC) by several mine inspectors pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). The contests concern ABC's challenge to the legality and propriety of the citations and orders, and the civil penalty proceedings concern MSHA's proposed civil penalty assessments for the alleged violations in question. Hearings were convened on May 14, 1985, in Birmingham, Alabama, and the parties appeared and participated therein.

Issues

The principal issue presented in these proceedings are (1) whether ABC violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties filed by MSHA, and if so, (2) the appropriate civil penalties that should be assessed ABC for the alleged violations based upon the criteria found in section 110(i) of the Act. Additional issues in connection with the contested citations and orders are identified and disposed of in the course of these decisions.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Discussion

The citations and orders issued in these proceedings were issued after the completion of a fatal accident investigation conducted by MSHA Inspector William E. Herren on October 15, 1984. The accident occurred when a continuous-mining machine operator was tramming a machine through a crosscut with a remote control unit and suffered fatal injuries when he was pinned between the machine and the rib.

Although the parties were prepared to go to trial on all of these cases, they advised me at the beginning of the hearings that they had reached a compromise, and proposed to settle all of the cases. Under the circumstances, the parties were afforded an opportunity to present arguments on the record in support of their proposed disposition of the cases (Tr. 5-42). A copy of MSHA's accident report, and photographs of the cited remote control unit were received and made a part of the record (exhibits ALJ-1, R-1 and R-2, and C-8 through C-12).

The circumstances surrounding each of the contested cases are as follows:

Docket No. SE 85-24-R

This proceeding concerns a section 104(a) citation, No. 2481846, with special "S & S" findings, issued by MSHA Inspector William Herren on October 16, 1984. The inspector cited a violation of 30 C.F.R. § 75.1719-1(d), when he found that certain working places in the mine where the continuous-mining machine involved in the accident was operated were not illuminated in compliance with the cited standard. The inspector found that four of the illuminated lights installed on the machine were inoperative.

MSHA's counsel asserted that while the inspector made no illumination tests, the citation is supportable, and that if called to testify, Inspector Herren would confirm that the inoperative lights resulted in a lack of adequate illumination. However, given the fact that no tests were made, counsel conceded that the lack of testing presented a disputed and open legal question which would be argued by the parties in support of their respective positions. Given this dispute, the parties proposed to settle this violation by ABC agreeing to pay a civil penalty in the amount of \$300. Upon approval of this proposal, the parties agreed that the citation should be affirmed and the contest dismissed.

In a posthearing letter filed with me on MSHA's counsel advised me that at the time the parties had anticipated that the proposed assessment for the violation would be \$500, proposed settlement was made on that basis. Counsel has now determined that the proposed settlement was actually \$91, and that ABC paid March 20, 1985. Under the circumstances that the citation be affirmed.

Docket No. SE 85-26-R

This proceeding concerns a section 107(a) imminent danger order, No. 2480147, issued by MSHA Inspector Newell E. Butler on October 22, 1984, and subsequently modified on October 22, 1984. The inspector alleged that the clearance maintained between a continuous-mining machine and the coal rib was inadequate to protect the machine operator, and that this condition resulted from inadequate training by mine management. The order was issued during the course of the fatality investigation.

MSHA's counsel asserted that upon further consideration of this order, including consultation with the inspector, MSHA has concluded that the order should be vacated. Under the circumstances, ABC's counsel requested to withdraw the contest, and agreed that it may be dismissed.

Docket No. SE 85-20-R

This proceeding concerns a section 107(a) imminent danger order, No. 2481839, issued by MSHA Inspector William Herren on October 16, 1984. The order was issued during the course of the fatality investigation, and Mr. Herren alleged that the remote control unit on the continuous-mining machine involved in the accident had been modified in an unauthorized manner, thereby, rendering the machine non-permissible and in violation of mandatory safety standard 30 C.F.R. § 75.503. The order was subsequently modified by Mr. Herren on November 6, 1984, to delete his reference to a violation of section 75.503, and it was amended to allege a violation of section 75.1725(a).

Docket Nos. SE 85-21-R and SE 85-82

This proceeding concerns a section 104(a) citation, No. 2481840, with special "S & S" findings, issued by Inspector Herren on October 16, 1984, in conjunction with the issuance of the imminent danger order noted in Docket No. SE 85-20-R. Inspector Herren issued the citation for a violation of section 75.503, but he subsequently modified it on November 6, 1984, by deleting this section and substituting an alleged violation of section 75.1725(a).

The parties proposed to settle the civil penalty case concerning contested Citation No. 2481840, (Docket No. SE 85-82), and ABC agreed to pay a civil penalty in the amount of \$6,100 for the violation (Tr. 6). The parties also agreed that the imminent danger order (Docket No. SE 85-20-R) should be affirmed, and that the contests (Docket No. SE 85-20-R and SE 85-21-R) should be dismissed.

Docket Nos. SE 85-23-R and SE 85-89

These proceedings concern a section 104(a) citation, No. 2481845, with special "S & S" findings, issued on October 16, 1984. The citation was issued when the inspector found that the remote radio control unit on a continuous-mining machine which had been removed from service had been modified in an unauthorized manner, thereby rendering the machines non-permissible in violation of mandatory safety standard 30 C.F.R. § 75.503.

The inspector modified the citation on November 19, 1984, deleting his allegation of a violation of section 75.503, and amending the violation to allege a violation of section 75.1725(a).

The parties agreed to an affirmation of the citation and they proposed to settle the matter by a payment by ABC of a civil penalty assessment in the amount of \$700 (Tr. 6, 7). At the time of the hearing, MSHA's counsel indicated that he expected the violation to be assessed at \$1,000, but that the circumstances presented warranted a reduction in the original penalty assessment.

In his posthearing letter of July 22, 1985, MSHA's counsel advised me that while the parties had expected the violation to be assessed at \$1,000, the proposed assessment is actually \$1,200 (SE 85-89). Counsel also advised that the parties have agreed to amend their proposed settlement as stated during the hearing to reflect an agreement by ABC to pay a civil penalty in the amount of \$900, in full settlement for the citation.

Docket Nos. SE 85-18-R and SE 85-19-R

These proceedings concern two section 104(a) citations, Nos. 2480143 and 2480144, with special "S & S" findings, issued on October 16, 1984, by MSHA Inspectors Newell E. Butler and William Herren. The citations were issued when the inspectors found that the remote radio control units on two continuous-mining machines which had been removed from service by the operator had been modified in an unauthorized manner, thereby rendering the machines non-permissible in violation of mandatory safety standard 30 C.F.R. § 75.503.

The inspectors modified the citations on November 19, 1984, deleting their allegations of violations of section

75.503, and amending the citations to allege violations of section 75.1725(a).

The parties proposed to settle these citations by ABC agreeing to pay civil penalties in the amount of \$700 for each of the citations, or a total of \$1,400 in penalties. Upon approval of their proposal, the parties agreed that the citations should be affirmed and the contests dismissed.

In his posthearing letter of July 22, 1985, MSHA's counsel states that at the time of the hearing the parties had anticipated proposed civil penalties of approximately \$1,000 for each of the citations. However, counsel has now determined that the proposed penalties were actually \$192 for each citation, and that the assessments were paid by ABC on February 20, 1985 (SE 85-18-R), and March 5, 1985 (SE 85-19-R). Under the circumstances, counsel requested that the citations be affirmed.

Size of Business and Effect of Civil Penalties on the Contestant/Respondent's Ability to Continue in Business

The parties agreed that ABC is a large mine operator and that the payment of the agreed-upon civil penalties will not adversely affect its ability to continue in business (Tr. 23-25).

Good Faith Compliance

The record in these proceedings reflects that all of the conditions or practices cited as violations were promptly abated by ABC within the time fixed by the inspectors. MSHA's counsel conceded that this was the case, and he agreed that ABC abated all of the violations in good faith (Tr. 23-25).

Negligence

MSHA's counsel argued that ABC exhibited a high degree of negligence with respect to all of the violations in question in these proceedings. With regard to the continuous-mining machine citations, counsel asserted the negligence was less than gross, and that had these cases proceeded to trial, ABC's counsel would have presented testimony indicating that on prior shifts, the remote controlled mining machine units were operating properly.

MSHA's counsel pointed out that while Inspector Herren found evidence that some of the control units had been

altered by tape or by "whittling" or shaving some of the control unit levers, these conditions were not readily observable or detectable through visual inspection, and that the inspector agreed that this was the case. Counsel also pointed out that after the accident occurred, the other cited machines were taken out of service by ABC and were not in use at the time they were cited. Counsel agreed that the inspector issued the citations in order to prevent the use of the machines until the defects could be corrected, and that ABC's actions in taking them out of service mitigates the negligence with respect to those violations.

ABC's counsel asserted that given the fact that his investigation reflected that the mining machine involved in the accident was found to be in proper working order on prior shifts, there is a strong presumption that the accident victim may have taped the left control lever, thereby, contributing to the conditions cited by the inspector.

MSHA's counsel consulted with Inspector Ferren, and he reported that Mr. Ferren's investigation did not disclose the identity of any individuals who may have altered the control levers on the cited mining machines. Counsel confirmed that Inspector Ferren had no reason to believe that the required weekly electrical inspections or preshift examinations were not conducted as required.

Gravity

I take note of the fact that the inspectors who issued the citations in these proceedings found a high degree of gravity, and that they made special findings that the cited violations were "significant and substantial" (S & S). In addition, although the parties subsequently agreed to a settlement disposition for all of the violations in question, the inspector's findings that they were "S & S" remains, and they agree that the citations are to be affirmed as issued. Under the circumstances, I conclude and find that all of the violations in issue in these proceedings are serious violations.

With regard to Citation Nos. 2480143, 2480144, and 2481845, I take note of the fact that in the narrative description of the cited conditions on the face of each citation form, the inspectors noted that the citations were a factor which contributed to the issuance of three additional imminent danger orders issued that same day. However, all of these orders were subsequently vacated by MSHA as unsupportable, and I dismissed the cases. Under the circumstances,

MSHA's vacation of the orders mitigates the gravity with respect to these violations.

History of Prior Violations

MSHA's counsel asserted that ABC has an "average" history of prior violations, and that its compliance record is not such as to warrant any additional increases in the civil penalty assessments proposed for the violations in question. Counsel confirmed that ABC's prior history does not include previous citations for defective continuous miner remote control units, or for conditions or practices similar to those cited by the inspectors in these proceedings (Tr. 23-25).

Findings and Conclusions

After careful consideration of the proposed settlement disposition of civil penalty proceedings SE 85-82 and SE 85-89, and taking into account the arguments at the hearing, I conclude and find that the proposed settlement dispositions are reasonable and in the public interest, and pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, they are APPROVED.

ORDER

Respondent Alabama By-Products, Inc., IS ORDERED to pay the following civil penalties for the violations which have been settled, and payment is to be made to MSHA within thirty (30) days of the date of these decisions.

Docket No. SE 85-82

Citation No.	<u>Date</u>	30 C.F.R. Section	Assessment
2481840	10/16/84	75.1725(a)	\$6,100

Docket No. SE 85-89


Citation No.	<u>Date</u>	30 C.F.R. Section	Assessment
2481845	10/16/84	75.1725(a)	\$ 900

In view of the settlement approvals, Citation Nos. 2481480 and 2481845, are AFFIRMED, and contest Docket Nos. SE 85-21-R and SE 85-23-R, are DISMISSED.

In view of the civil penalty assessment dispositions made by and between the parties in connection with contests Docket Nos. SE 85-18-R, SE 85-19-R, and SE 85-24-R the citations in issue in those proceedings (2480143, 2480144, and 2481846) are all AFFIRMED, and the contests are DISMISSED.

By agreement of the parties, the section 107(a) imminent danger order, No. 2481839, issued on October 16, 1984, in Docket No SE 85-20-R, is AFFIRMED as issued, and the contest is DISMISSED.

In view of MSHA's assertion at the hearing that the section 107(a) imminent danger order, No. 2480147, issued on October 22, 1984, in Docket No. SE 85-26-R, cannot be supported, and in light of MSHA counsels' assertion by letter filed with me on July 22, 1985, that the order has been vacated, the contest is DISMISSED.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

AUG 30 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 82-38
Petitioner	:	A.C. No. 11-00609-03034
	:	
v.	:	Captain Mine
	:	
SOUTHWESTERN ILLINOIS COAL	:	
CORP.,	:	
Respondent	:	

DECISION ON REMAND

Before: Judge Broderick

By a decision issued May 15, 1985, the Commission concluded that Respondent violated 30 C.F.R. § 77.1710(g) and remanded the case to me for determination whether the violation was significant and substantial and for the assessment of an appropriate civil penalty.

On August 2, 1985, the Secretary filed a motion to dismiss and approve a settlement entered into by the parties. The parties agree that the violation was significant and substantial because it could result in a serious injury or fatality. They agree to settle the case for \$70 (it was originally assessed at \$90). The motion states that Respondent was not negligent, and that it corrected the violation by disciplining the miner involved and instructing the employees on the need for using safety belts.

I conclude that the motion should be granted. I conclude that the violation was significant and substantial. An appropriate penalty for the violation is \$70.

Respondent is ORDERED to pay the sum of \$70 within 30 days of the date of this decision.


James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

AUG 30 1985

PAUL KREVOKUCH,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. PENN 84-198-D
v.	:	PITT CD 84-11
	:	
CRESCENT HILLS COAL CO.,	:	
INC.,	:	
Respondent	:	

DECISION

Appearances: Richard W. Schimizzi, Esq., Law and Finance Bldg.,
Greensburg, Pennsylvania
for Complainant;
Jane A. Lewis, Esq., Thorp, Reed & Armstrong,
Pittsburgh, Pennsylvania
for Respondent.

Before: Judge Lasher

This proceeding, which was initiated by the filing with the Federal Mine Safety and Health Review Commission of a complaint of discrimination by Paul Krevokuch on August 9, 1984, arises under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (1976 & Supp. V 1981), hereinafter "the Act".

By letter dated July 10, 1984, the Complainant had been notified that his complaint of discrimination (filed April 26, 1984) before the Mine Safety and Health Administration (MSHA), had been investigated and the determination made that a violation of section 105(c) had not occurred. Under the Act, a complaining miner has an independent right to bring a second complaint before this Commission and this proceeding is based on that right.

On September 21, 1984, the Respondent filed a motion to dismiss alleging inter alia that the complaint was not timely filed since it was filed more than 60 days after the alleged discriminatory act of Respondent, the discharge of Mr. Krevokuch on February 25, 1983.

preliminary hearing to determine the issues raised by the to dismiss was held on the record in Washington, .vania on December 13, 1984, at which both parties were .anted by counsel.

The MSHA complaint was filed on April 26, 1984. There is no question but that it was filed with the Secretary approximately 1-year beyond the 60-day period prescribed in section 105(c) of the Act. 1/

The Commission has held that while the purpose of the 60-day time limit is to avoid stale claims, a miner's late filing may be excused on the basis of "justifiable circumstances," Joseph W. Herman v. IMCO Services, 4 FMSHRC 2135 (December 1982). The Mine Act's legislative history relevant to the 60-day time limit states:

While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60-day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act. S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978) (emphasis added).

Timeliness questions therefore must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation.

The reliable and probative evidence of record indicates that the 65-year old Complainant was hired by Respondent on May 1, 1972, as a fire boss. Thereafter he worked as a mine foreman for 9 years until he was discharged on February 25, 1983. During the 2 years he was a fire boss he was a member of the United Mine Workers of America which membership terminated when he became foreman. Complainant, who has a 7th grade education, has not worked since his discharge.

Complainant testified that as mine foreman he was responsible for safety matters but prepared no safety reports, never dealt with MSHA officials, and did not know where the MSHA

1/ Although Complainant testified that he asked for re-employment with Respondent after his discharge and was turned down, I conclude that the 60-day filing period should commence on the discharge date, February 25, 1983, since it is clear from the findings made herein that the discriminatory event occurred on that date and not on some subsequent unspecified and indeterminate date when Complainant may have asked for his job back.

office was located. He did have dealings with the Safety Director and discussed "safety problems" with him (Tr. 24).

Complainant's son-in-law, Robert Kerin, was formerly Safety Coordinator for Respondent until approximately 1978-1979 and is currently Safety Coordinator for Gulf & Western in Tennessee. After conferring with him Complainant filed an age discrimination complaint with the Equal Employment Opportunity Commission (Tr. 15) on or about December 1, 1983 (approximately 7 months after his discharge). The EEOC referred the matter to the Pennsylvania Human Relations Commission (PHRC) where the EEOC matter was pending at the time of the hearing herein (Tr. 45, 119-120). In this complaint (Ex. R-2) Complainant alleged as follows:

"I. I was laid off from my position as mine foreman at the Daisytown Mine on February 25, 1983. Since that time the company has refused to recall me. I had worked for them since May 1972. My record is excellent in production, safety and other relevant employment factors. I believe that I am the oldest foreman in the company.

II. On February 25, 1983 General Superintendent, Joseph Reggiannai laid me off. He refused to offer any reason. I have contacted the company many times concerning a recall. I am told that no work is available.

III. I believe that I am being discriminated against because of my age, 64, for the following reasons:

a. I was the oldest senior foreman at Daisytown mine. My employment record is equal superior to that of most other foremen.

b. My position was given to Mr. William Somplaskty. He is about 44 years of age.

c. My lay-off also resulted in the reassignment or promotion of two younger foreman Mr. Felechutti and Mr. Bertoty. Each of them is probably less than 40 years of age.

d. Mr. Bertoty was later laid off and replaced by Bennett a foreman who laid off during 1982. Mr. Bennett is approximately 45 years of age.

e. When Daisytown Mine closed, Mr. Bennett, Mr. Somplaskty and Mr. Reggiannai transferred to Ocean mine. Mr. Reggiannai and Mr. Bennett are still employed there in jobs that I can perform."

In his MSHA complaint (Ex. R-3), Complainant alleged:

"... I believe that I am being discriminated against because of the following:

2. In January of 1983 I was instructed to mine beyond roof supports and refused to follow their instructions. I feel that they have discriminated against me because of my actions towards my own safety and the safety of my men." 2/

At the hearing herein Complainant repeatedly attributed a third reason for his being discharged: his high wage level. (Tr. 19, 45-46, 144).

The following dialogue is persuasive:

"Q. Why do you think you were discharged or laid off, Mr. Krevokuch?

A. Well, I believe I stated before, I think wages had something to do with it.

Q. And what do you think wages had to do with your lay off or discharge?

A. Making too much money.

Q. You think the company wanted to get rid of you because you were making too much money?

A. Yes, Ma'am.

Q. Do you think anything else had to do with the reason for your lay off or discharge?

A. Well, do you want to get back to the wages, I want to mention one more item?

Q. Go ahead.

A. Mr. Reggianni, at the Pennsylvania Humane Relations Commission mentioned and told Belinda Stern that at the time they laid me off that for what they was paying me, they are paying two Foreman at the present time.

2/ The quoted language, although general and conclusionary, does constitute an allegation of a cause of action cognizable under the Act.

Q. All right. Is there anything else involved, in your opinion, in the reason that you were fired or laid off?

A. All I know is of age and wages, up to that point.

Q. And, why do you think, now, today, as you sit here, why do you think you were fired or laid off?

A. Wages."

(Tr. 45, 46).

* * * * *

"At one time you thought you were discharged only because of your age; is that correct?

THE WITNESS: Right, Your Honor.

JUDGE LASHER: This morning you thought you were discharged only because of your high wages.

Is that true or false?

THE WITNESS: Well, I believed that that had a part in it.

JUDGE LASHER: That had a part in it?

THE WITNESS: Right, that wages was a part.

JUDGE LASHER: Okay. Is there any other part, then, besides that that you think you were discharged?

THE WITNESS: No, Your Honor.

JUDGE LASHER: You don't think it was because of these safety matters?

THE WITNESS: No. No, Your Honor."

(Tr. 144).

Complainant gave the following account of his discharge by then General Superintendent Joseph Reggianni on February 25, 1983:

"It was very brief. He told me that he was sorry, but that I was laid off." (Tr. 13).

The Complainant also testified that Mr. Reggianni did not tell him why he was being "laid off" (Tr. 14) and that he first learned that he was discharged because of 3 Section 104(d) safety violations he was responsible for from the testimony of company officials at a hearing in Pittsburgh before the PHRC on April 24, 1984 (Tr. 17, 18, 47-57). Two days later, on April 26, 1984 he filed his discrimination complaint with MSHA.

Mr. Reggianni testified that the decision to discharge Complainant was made jointly by 3 of Respondent's officials, Mel Pelvehette, co-owner, Jacob Kassab, co-owner and president, and himself because of the 3 violations which occurred over a period of approximately 1 1/2 years. He said that other foremen had received "safety violations" but that Complainant was the only one to get 3 violations. (Tr. 77, 80-84, 122). Mr. Reggianni said that he waited until the end of a pay period on February 25, 1983, to discharge Complainant and that all he said was: "You are terminated on account of 3 104(d) safety violations ..." and that Complainant said "OK" and walked out of his office. (Tr. 77-78, 123). ^{3/} No written termination slip was given Complainant.

Following the occurrence of the last of the 3 violations an MSHA investigation carrying the "possibility of criminal penalties" against Complainant ensued (Tr. 85, 86). Another foreman had been discharged for safety violations approximately 2 years previously (Tr. 125). Complainant alleges, as justification for his 1-year filing delay, that he was not aware until the Pennsylvania HRC hearing that he had been accused of and discharged for "safety" reasons (Tr. 48). The Respondent's contention at that hearing was that Complainant was discharged because of his responsibility for 3 safety violations. Assuming for the sake of argument that this is so, it is not justification. Being responsible for or causing safety violations is not a protected activity under the Mine Safety Act; any delay in learning that this was a mine operator's reason for discharging a miner affords no justification for a filing delay.

Complainant's testimony as to his lack of guilt in the commission of the violations and as to his safety-consciousness in the execution of his duties as foreman does not change the nature of what he learned at the PHRC hearing on April 24, 1984. Had he learned at the PHRC hearing that he was discharged for a protected safety activity and had it been established also that it was the first time he had any reason to believe it was the reason he was discharged, some justification for the filing delay would have been manifested.

^{3/} Because of the consistency of Respondent's position, and the inconsistency of Complainant's allegations for his being discharged, Mr. Reggianni's version of the discharge, conversation is accepted as having the greater weight. It is significant that, even under Complainant's account thereof, he did not inquire as to why he was being let go.

However, learning that one was discharged for committing safety violations is a direct opposite of learning that one was discharged for engaging in "safe mining practices" or exercising safety rights protected under the Act.

Again, while Complainant on the one hand contends that he did not learn he was discharged for safety reasons until April 24, 1984, he, on the other hand, repeatedly maintains that he was discharged because of his high wage level. Had he acquired, on April 24, 1984, some basis for believing that he was discharged for engagement in protected safety activities and had some good faith belief that this was the reason, some justification for his delay might have been established. The voucher for Complainant's lack of justification for his late filing is that even now he continues to believe that it was his wage level, not protected safety activities, that brought on his discharge.

The 60-day statutory limitation is not a particularly long filing period in view of the lack of sophistication of the average Complainant and the complexity of some of the legal bases for bringing a discrimination action. On the other hand, the placement of limitations on the time-periods during which a plaintiff may institute legal proceedings is primarily designed to assure fairness to the opposing party by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. Where, as here, the filing delay is prolonged, it seems a fair proposition to require a clear justiciable explanation therefor.

The length of the time lapse as well as the illogical basis asserted for the delay mandate the conclusion that such delay in filing the complaint was not justified and that it was not timely filed.

ORDER

Respondent's motion to dismiss is granted and this proceeding is dismissed.

Michael A. Lasher Jr.
Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

AUG 30 1985

CHESTER W. CRAIG,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEVA 84-252-D
	:	
v.	:	MORG CD 84-8
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

On June 13, 1984, you filed with this Commission a complaint of discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977. On January 23, 1985 you were ordered to provide within 30 days certain information concerning your complaint, or show good cause for your failure to do so. Our records show that you received this order by certified mail on January 26, 1985. However, you never responded to the order.

Because you have failed to provide the required information or show cause why you did not, your complaint is hereby DISMISSED.


Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 30, 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 85-1-M
Petitioner	:	A. C. No. 18-00707-05502
	:	
v.	:	Docket No. YORK 85-3-M
	:	A. C. No. 18-00707-05503
DANEKER SAND & GRAVEL,	:	
Respondent	:	Daneker Sand & Gravel

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The Solicitor has filed a proposal for penalty for the ten violations involved in this matter. The original assessments for the alleged violations in both cases totalled \$528, and the proposed settlements are for \$132. The Solicitor believes that reduction from the original assessment is warranted for the following reasons.

Citation Nos. 2369404, 2369405, 2369406, 2369407, 2369408, 2369410, 2369411 and 2369412 were all issued on July 16, 1984 for violations of 30 C.F.R. § 56.15-1. These violations involved the lack of guards on machinery such as conveyor rollers (2369405), (2369406); pinch points of V-belt drives (2369407), (2369412); tail pulleys of the No. 1 conveyor (2369404); a gravel conveyor (2369408), (2369410); and sand conveyor (2369411). Four of these violations were originally assessed at \$68, and the other four at \$54. The violations were later terminated when the operator provided the appropriate guards.

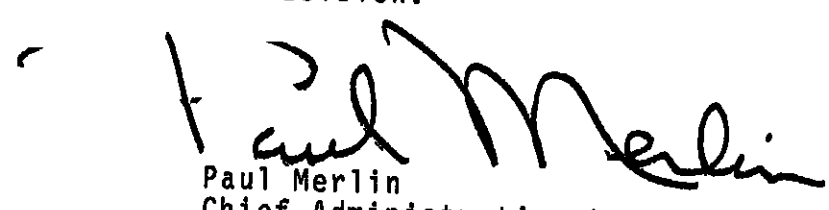
Citation No. 2369415 was issued for a violation of 30 C.F.R. § 56.15-1 and originally assessed at \$20. The inspector observed that first aid equipment was not provided at the mine site. Citation No. 2369414 was issued for a violation of 30 C.F.R. § 56.9-87 and originally assessed at \$20 when an inspector observed that the back-up alarm on the loader feeding the wash plant was out of order.

The Solicitor believes that a reduction from the total amount originally assessed is appropriate due to the financial hardship involved here. Daneker Sand and Gravel, a sole proprietorship, reported losses of \$136,250 in 1983 and \$62,155 in 1984. The supervisory inspector on this case believed that

the tax returns accurately reflected the state of the business and recommended to his supervisor that the penalties "be reduced as much as possible." The parties assert that the original assessment of \$528 would affect the operator's ability to stay in business. Mr. Daneker has shown good faith in abating the conditions. Also, there were no other assessed violations in the prior two year period.

In view of the foregoing, I accept the parties' representations and conclude that the reduced penalties are appropriate under the statutory criteria of section 110(i) which take into account the effect of a penalty on an operator's continued ability to remain in business. However, the guarding violations are a cause for concern and I trust the operator will be more careful in the future.

Accordingly, the operator is ORDERED TO PAY \$132 within 30 days of the date of this decision.



Paul Merlin
Chief Administrative Law Judge

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